

# THE LAW REPORTER.

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MARCH, 1847.

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## THE NEW CONSTITUTION OF NEW YORK.

THE entire reorganization of the judicial system of a state so considerable as New York, must not pass unnoticed in the pages of a journal intended to chronicle everything of interest to the profession of the law. The circumstances which led to the call of the convention, whose work has recently been adopted by the people of the state of New York, ought to be kept in view in forming our judgment of the results arrived at. The four principal circumstances which led to the convocation of the body were the alleged abuses in the contraction of debt by the legislature; the accumulation of offices in the gift of the executive; the enormous growth of corporations together with the alleged irresponsibility of the banking companies; and the delays of right in the courts of justice. These were the principal sources of complaint. To these were added, it is true, minor and local causes of dissatisfaction; such as the disturbances resulting partly from the manorial tenures, but more from the mischievous demagogues who had tampered with those feuds; and the desire of that portion of the voters tinged with abolition doctrines, to extend the right of suffrage to the African race. To these, as matter of history, should be undoubtedly added the vehement desire of a portion of the political minority for any change which might by possibility restore them to power. But we intend here only to lay stress on those reasons which operated upon

the sincere and honest convictions of a majority of the voters. And the four great questions of the public debt, appointments, corporations, and the judiciary, were beyond all doubt the real motives in the public mind; nor would the three former of these have probably been adequate to call the convention into existence, had it not been for the enormous evils which existed in the administration of the law, and which had forced the bar as a body (always an influential and always a conservative body) to the conviction that no substantial remedy could be effected by any legislative means. And it is again to be noticed that this conviction was compelled on the mind of the profession, by the stubborn opposition which many of the leading functionaries under the old system had given to all effectual change. In truth, the convention may be fairly said to have been called into being by its most determined enemies. With these brief prefatory remarks we shall better be able to understand the results at which the convention arrived — results of a very various character, and very variously viewed by the people of the state; a majority, and a large majority, of whom, however, have ratified the work.

*First*; in regard to the public debt. The debt of the state of New York had swollen, at the time of the call of the convention, to nearly thirty millions of dollars — a sum insignificant in itself, but very material when taken into connection with the fact, that a direct tax had become necessary to keep down the interest; and that several of the states, with as little ground for excuse, had actually repudiated their engagements. The remedy proposed for this evil, and adopted by the convention, was a severe restriction on the power of the legislature to contract any debt beyond a small sum.

The sections as they stand in the new constitution are as follows: —

§ 10. The state may, to meet casual deficits or failures in revenues, or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not, at any time, exceed one million of dollars; and the moneys arising from the loans creating such debts, shall be applied to the purpose for which they were obtained, or to repay the debt so contracted, and to no other purpose whatever.

§ 11. In addition to the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or defend the state in war; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

§ 12. Except the debts specified in the tenth and eleventh sections of this article, no debt shall be hereafter contracted by or on behalf of this state, unless such debt shall be authorized by a law for some single work or object, to be distinctly specified therein, and such law shall impose and provide for the collection

of a direct annual tax to pay, and sufficient to pay the interest on, such debt as it falls due, and also to pay and discharge the principal of such debt within eighteen years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it, at such election. On the final passage of such bill in either house of the legislature, the question shall be taken by ayes and noes, to be duly entered on the journals thereof, and shall be: "Shall this bill pass, and ought the same to receive the sanction of the people?" The legislature may at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time, by law, forbid the contracting of any further debt or liability under such law; but the tax imposed by such act, in proportion to the debt and liability which may have been contracted in pursuance of such law, shall remain in force and be irrepealable, and be annually collected until the proceeds thereof shall have made the provision herein before specified, to pay and discharge the interest and principal of such debt and liability. The money arising from any loan or stock creating such debt or liability, shall be applied to the work or object specified in the act authorizing such debt or liability, or for the repayment of such debt or liability, and for no other purpose whatever. No such law shall be submitted to be voted on, within three months after its passage, or at any general election, when any other law, or any bill, or any amendment to the constitution, shall be submitted to be voted for or against.

§ 13. Every law which imposes, continues, or revives a tax, shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object.

And in the same spirit is the ninth section of the seventh article.

§ 9. The credit of the state shall not, in any manner, be given or loaned to, or in aid of any individual, association or corporation.

We do not intend to discuss the merits of these provisions. They are intended, and in our judgment well devised to check, if not altogether to prevent, an enormous evil. They show a sagacious forecast and a conservative spirit of the true character.

*Secondly*, as to the offices in the gift of the executive. This evil had reached a prodigious height. Nearly three hundred county judges and surrogates, scores of inspectors, masters, examiners, notaries, and commissioners, in all not very far short of a thousand officers, held their commissions directly from the executive; commissions, too, distributed on the most rigorous application of the very conscientious maxim, that "to the victors belong the spoils." And the consequence was, that, at every turn of the political wheel, the scramble for office had become selfish and violent to the last degree. The applicants actually blockaded the chief magistrate; who, bewildered by personal applications, as well as by clouds of petitions and recommendations, obtained, at least in half the instances, from persons either wholly ignorant of the facts to the truth of which they certified, or utterly

unworthy of any influence on account of their own character, was totally at a loss whom to appoint and whom to reject; and fully felt the truth of Walpole's trite saying about "ingrates and patriots." With this evil the convention made short work; nearly all these offices were either abolished, or made elective, and their creation given to the local constituencies. The system of compulsory inspection of merchandise, which had become a very cumbrous piece of machinery, objectionable on principle from its interference with the operations of trade, but still more so in practice, from its providing a large number of offices to be distributed like plunder among the adherents of the successful party, was cut up root and branch by the following beneficent section:

§ 8. All offices for the weighing, guaging, measuring, culling or inspecting any merchandise, produce, manufacture or commodity whatever, are hereby abolished, and no such office shall hereafter be created by law; but nothing in this section contained, shall abrogate any office created for the purpose of protecting the public health or the interests of the state in its property, revenue, tolls, or purchases, or of supplying the people with correct standards of weights and measures, or shall prevent the creation of any office for such purposes hereafter.

*Thirdly, as to corporations.* This subject the convention found it more difficult to handle. An attempt was made to render all corporators personally responsible, but it failed. And the provisions adopted are rather modifications of the old system, which go to show what the convention would have been inclined to do if ordinary matters of legislation had been entrusted to them, than binding provisions framed to compel obedience. So it is with the first and second sections of the corporation article:

§ 1. Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section, may be altered from time to time or repealed.

§ 2. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law.

In regard to banks, however, they adopted the following stringent provisions:

§ 4. The legislature shall have no power to pass any act granting any special charter for banking purposes; but corporations or associations may be formed for such purposes under general laws.

§ 5. The legislature shall have no power to pass any law sanctioning in any manner, directly or indirectly, the suspension of specie payments, by any person, association or corporation issuing bank notes of any description.

§ 7. The stockholders in every corporation and joint-stock association for banking purposes, issuing bank notes or any kind of paper credits to circulate as money, after the first day of January, one thousand eight hundred and fifty, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind, contracted after the said first day of January, one thousand eight hundred and fifty.

These provisions were intended to prohibit the creation of any banks by special charter, the legislative gambling connected with which was formerly a great abuse in the state. They render a suspension of specie payments, as far as legislation is concerned, a thing very difficult, and impose the check of personal responsibility upon all issues of paper money. We think these sections dictated by a wise, comprehensive, and enlightened view of the necessities of the state, and the dangers to which she might be again, as she has heretofore, been exposed.

*Fourthly*, the judiciary. We cannot do better here than first to state the evils complained of; then give the article on this subject, as adopted; and, lastly, call attention to the alterations effected. The great evils complained of in the former system of the state, were, first, the *court of errors*. Its cumbrous character, its political complexion, resulting from its identity with the senate, and the consequent uncertainty of its decisions, had made it very unpopular with the great body of the profession. The *court of chancery* had become, perhaps, still more disliked, from the concentration of power in a single hand, and from the intolerable delays to which suitors were subjected. "What matters it," is reported to have said the chancellor, "whether this cause be heard this term or not?—I cannot look at the papers for *two years* to come." The admission was candid, but fatal to the court. The *supreme court* was disliked on account of the separation of its judges into judges of law and judges of fact, and the evils resulting from this sequestration of the higher judges from juries and witnesses, and the active business of the profession; while the common pleas of most of the counties had become pretty notorious for incompetency. To remedy these evils the convention adopted the following articles. We omit the section on impeachments, which are, as before, attributed to the senate.

§ 2. There shall be a court of appeals, composed of eight judges, of whom *four shall be elected by the electors of the state for eight years*, and four selected from the class of justices of the supreme court having the shortest time to serve. Provision shall be made by law, for designating one of the number elected, as chief judge, and for selecting such justices of the supreme court, from time to

time, and for so classifying those elected, that one shall be elected every second year.

§ 3. There shall be a supreme court having general jurisdiction in law and equity.

§ 4. The state shall be divided into *eight judicial districts*, of which the city of New York shall be one: the others to be bounded by county lines, and to be compact and equal in population as nearly as may be. There shall be four justices of the supreme court in each district, and as many more in the district composed of the city of New York, as may from time to time be authorized by law, but not to exceed in the whole such number in proportion to its population, as shall be in conformity with the number of such judges in the residue of the state in proportion to its population. They shall be classified so that one of the justices of each district shall go out of office at the end of every two years. After the expiration of their terms under such classification, the term of their office shall be eight years.

§ 5. The legislature shall have the same powers to alter and regulate the jurisdiction and proceedings in law and equity, as they have heretofore possessed.

§ 6. Provision may be made by law for designating, from time to time, one or more of the said justices, who is not a judge of the court of appeals, to preside at the general terms of the said court to be held in the several districts. Any three or more of the said justices, of whom one of the said justices so designated shall always be one, may hold such general terms. And any one or more of the justices may hold special terms and circuit courts, and any one of them may preside in courts of oyer and terminer in any county.

§ 7. The judges of the court of appeals and justices of the supreme court shall severally receive, at stated times for their services, a compensation to be established by law, which shall not be increased or diminished during their continuance in office.

§ 8. They shall not hold any other office or public trust. All votes for either of them, for any elective office (except that of justice of the supreme court, or judge of the court of appeals,) given by the legislature or the people, shall be void. They shall not exercise any power of appointment to public office. Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practise in all the courts of this state.

§ 9. The classification of the justices of the supreme court; the times and place of holding the terms of the court of appeals, and of the general and special terms of the supreme court within the several districts, and the circuit courts and courts of oyer and terminer within the several counties, shall be provided for by law.

§ 10. *The testimony in equity cases shall be taken in like manner as in cases at law.*

§ 11. Justices of the supreme court and judges of the court of appeals, may be removed by concurrent resolution of both houses of the legislature, if two-thirds of all the members elected to the assembly and a majority of all the members elected to the senate concur therein. All judicial officers, except those mentioned in this section, and except justices of the peace, and judges and justices of inferior courts not of record, may be removed by the senate, on the recommendation of the governor: but no removal shall be made by virtue of this section, unless the cause thereof be entered on the journals, nor unless the party complained of, shall have been served with a copy of the complaint against him, and

shall have had an opportunity of being heard in his defence. On the question of removal, the ayes and noes shall be entered on the journals.

§ 12. *The judges of the court of appeals shall be elected by the electors of the state, and the justices of the supreme court by the electors of the several judicial districts, at such times as may be prescribed by law.*

§ 13. In case the office of any judge of the court of appeals, or justice of the supreme court shall become vacant before the expiration of the regular term for which he was elected, the vacancy may be filled by appointment by the governor, until it shall be supplied at the next general election of judges, when it shall be filled by election for the residue of the unexpired term.

§ 14. *There shall be elected in each of the counties of this state, except the city and county of New York, one county judge, who shall hold his office for four years.* He shall hold the county court, and perform the duties of the office of surrogate. The county court shall have such jurisdiction in cases arising in justices courts, and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases. The county judge, with two justices of the peace, to be designated according to law, may hold courts of sessions with such criminal jurisdiction as the legislature shall prescribe, and perform such other duties as may be required by law. The county judge shall receive an annual salary, to be fixed by the board of supervisors, which shall be neither increased nor diminished during his continuance in office. The justices of the peace for services in courts of sessions, shall be paid a per diem allowance out of the county treasury. In counties having a population exceeding forty thousand, the legislature may provide for the election of a separate officer to perform the duties of the office of surrogate. The legislature may confer equity jurisdiction in special cases upon the county judge. Inferior local courts, of civil and criminal jurisdiction, may be established by the legislature in cities; and such courts, except for the cities of New York and Buffalo, shall have an uniform organization and jurisdiction in such cities.

§ 15. The legislature may, on application of the board of supervisors, provide for the election of local officers, not to exceed two in any county, to discharge the duties of county judge and of surrogate in cases of their inability, or of a vacancy, and to exercise such other powers in special cases as may be provided by law.

§ 16. The legislature may reorganize the judicial districts at the first session after the return of every enumeration under this constitution, in the manner provided for in fourth section of this article, and at no other time; and they may, at such session, increase or diminish the number of districts, but such increase or diminution shall not be more than one district at any one time. Each district shall have four justices of the supreme court; but no diminution of the districts shall have the effect to remove a judge from office.

§ 17. *The electors of the several towns shall, at their annual town meeting, and in such manner as the legislature may direct, elect justices of the peace, whose term of office shall be four years.* In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. Justices of the peace and judges or justices of inferior courts, not of record, and their clerks, may be removed, (after due notice and an opportunity of being heard in their defence) by such county, city or state courts as may be prescribed by law, for causes to be assigned in the order of removal.

§ 18. *All judicial officers of cities and villages, and all such judicial officers as*

*may be created therein by law, shall be elected at such times and in such manner as the legislature may direct.*

§ 19. The clerks of the several counties of this state shall be clerks of the supreme court, with such powers and duties as shall be prescribed by law. A clerk for the court of appeals, to be *ex officio* clerk of the supreme court, and to keep his office at the seat of government, shall be chosen by the electors of the state; he shall hold his office for three years, and his compensation shall be fixed by law, and paid out of the public treasury.

§ 20. No judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office.

But little observation is requisite to show us how sweeping are the changes effected by this article. In fact, the entire judiciary of the state is utterly demolished and reconstructed. Court of errors, court of chancery, supreme court, common pleas, are utterly and entirely blotted out, and a new system is formed out of new materials. The justices of the peace alone are left. We may examine it first in regard to the organization, and next in regard to the mode of creation and tenure of the incumbent. The court of errors gives way to the court of appeals. The court of chancery ceases to exist entirely, and its powers are given to the supreme court. Chancellors, vice-chancellors, masters and examiners, all end their being together. The supreme court is retained in name, but completely altered in its character, divided into eight district courts, administering the law mainly in their localities, and the old *nisi prius* system is restored. The county courts are reduced, as far as litigation is concerned, to a mere supervision of the justices' courts, and the duties of the surrogate are conferred on the county judge. Fees are abolished so far as they "*are received to the use of the officers.*" The tenure is equally altered. The term of all the judges is limited to eight years, and they are all made elective. Four of the judges of the court of appeals by the state at large — all the thirty-two of the supreme court (from whom the remaining four are selected) are chosen by their respective districts.

Such is this system; and it is not difficult, it appears to us, in some respects, to form an opinion of it. As regards the court of appeals, it is an improvement on the old court of errors. That was a body of thirty-two members, elected for four years, eight going out every year — all politicians, elected as such and elected by districts. The present court of appeals consists of but eight, half elected by the state at large, half by districts, and elected for eight years. It is very plain to our minds that this is a clear improvement. We wish we could say the same of the supreme court and the court of chancery. As to the first, indeed, it is no court at all. It is eight district courts, of which the judges are elected on the basis of uni-

versal suffrage, by their respective districts for eight years. As to the elective principle, we have no hesitation in saying that we object to it entirely as applied to the judiciary. The judge is not a representative officer, he is not a delegate in any sense of the word. In regard to political questions and political functionaries, the principle of election is safe, because every man takes an active interest, feels that in their determination or operations, his own happiness may be involved, and in the clash of selfish refinement and earnest, though sometimes rude and unenlightened liberty, the best interests of the greater number generally triumph. But in regard to the judiciary the case is quite different. A very small portion of any population are litigants, a very small portion have any direct interest in the creation of judges; and still fewer are they who will exert themselves for the election of proper or the defeat of improper candidates merely on the ground of public advantage. But if election is unwise in itself, how much more so does it become when applied to separate localities? What is to secure the judiciary of New York from being the mere mouth-piece of the faction, passion, and ignorance of each district? Why will not one be elected this year in one district, on the question of rent and anti-rent; another next year, on that of license or no license; another on that of abolition or pro-slavery, until the bench is filled by political mountebanks or designing demagogues?

If the people of the state of New York will bring to the election of judges their real intelligence and honesty — if they will disregard the ties of party, when those ties conflict with the election of able and impartial men, — if their stern and sturdy PEOPLE will turn out to defeat the midnight machinations of hungry office-seekers and crafty plotters — all may go well. But if not, and if the elections of judges are managed as elections are usually managed in our courts, by secret caucus and the party drill, we see nothing, under God, which is to avert from the state that last and greatest curse — an incompetent judiciary — judges too ignorant to see justice, or too corrupt to administer it; who would extend their evil influence far beyond the sphere of the tribunals, and contaminating the bar by their evil example, would spread the virus into the heart of the community itself. Take, for instance, the anti-rent district, where the division between whigs and democrats gives the disaffected tenantry a controlling majority, — with anti-rent assessors to select the juries — anti-rent sheriffs and clerks to return them, and anti-rent judges to try the causes, — what becomes of the landlord in any case of controversy? A more ludicrous specimen of the working of free institutions, working to bring about

an absolute tyranny could not well be imagined. Let us hope that the magnitude of the evil may suggest a remedy.

In other respects we take pleasure in saying, that in our judgment the new system is an immense improvement on the last. The abolition of fees closes the door on a host of delays and abuses, and the restoration of the old *nisi prius* system gives, in our opinion, the only means of obtaining a complete judge. As to the union of law and chancery, sound legal minds will greatly differ. Few will fail to regret the extinction of the ancient title of chancellor, and some will bestow a sigh on the masters—those *collaterals, et socii cancellarii*. Indeed, if the jurisdictions of law and equity are to be kept distinct, clearly it is best they should be administered by different functionaries. But if we look to the scientific administration of justice, we think we can see that the state of New York has an opportunity now to place her jurisprudence on a basis of simplicity and order which she has never before enjoyed. The twenty-fourth section of the judiciary article runs as follows:

§ 24. The legislature at its first session after the adoption of this constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify and abridge the rules and practice, pleadings, forms and proceedings of the courts of record of this state, and to report thereon to the legislature, subject to their adoption and modification from time to time.

We see nothing to prevent these commissioners, by a judicious but bold modification of the *forms of action*, from putting an end at once to all distinction between law and equity, where there is now a concurrent jurisdiction; and by a very little (though certainly very much considered) legislation, it would be equally practicable to give all the equity powers to the common law courts, and thus put an end forever to the discord that prevails in consequence of the existence of the separate tribunals.<sup>1</sup>

<sup>1</sup> The recent work of Mr. Spence, on the equitable jurisdiction of the court of chancery, is indispensable to those who wish to attain a correct idea of the origin, nature, or functions of that court, as it still exists in England, or as till January, 1847, it existed in New York. The defects of the common law—the superior justice and more ample remedies of the courts of equity, have never been so clearly portrayed or exhibited with the aid of so much learning and ability. Nor is Mr. Spence insensible of the evils of the division of the jurisdictions, though he very rightly says, that as long as courts of law only give judgment for damages, they can never oust chancery of its jurisdiction. He says as to the division of the two systems, “What may be effected when some modern TRIBONIAN shall appear with the capacity and the power of compiling from the now almost countless volumes of the law, a rational and uniform system of jurisprudence, unfettered by merely casual and technical principles, it would be idle at present even to hazard a conjecture.” Spence Eq. Juris. of Chancery, p. 715. We hope before long to take a more extended notice of this important addition to our legal libraries.

The constitution contains the following provision on the great subject of codification : " The legislature, at its first session after the adoption of this constitution, *shall appoint three commissioners, whose duty it shall be to reduce into a written and systematic code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient.*" A provision, which, if it be wisely carried out, and the task be entrusted to competent hands, may be productive of very important results ; and which, on the other hand, if committed to unwise or insufficient persons, may throw the jurisprudence of the state into the most admired disorder. In this, indeed, as in many other particulars, the new constitution depends so much on the practical sagacity and discretion with which its provisions are carried into effect, that it is utterly impossible to predict beforehand the effects that it is to produce.

It may not be amiss here to remark, that neither the anti-renters nor the abolitionists took much by their motions. The first obtained nothing but a barren, and, with due deference, very frivolous, prohibition of leases of agricultural land for more than twelve years — (the landlord who would, with the experience of the Van Rensselaers, give one half as long a lease within the anti-rent district, should be shut up in the first convenient lunatic asylum,) — and the friends of the African race were defeated in their attempt to extend the suffrage by a very great majority of the popular voice.

Our article has grown to such a length, that we have not time to notice several features in the new constitution well worthy of attentive consideration, such as the removal of the incompetency of witnesses on the ground of their religious belief ; the slight restraint on the naturalized vote, by the requisition of a ten days citizenship ; and the proposed tribunals of conciliation. We cannot, however, omit the following :

§ 15. No bill shall be passed unless by the assent of *a majority of all the members elected* to each branch of the legislature, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal.

The convention has certainly not been wanting in distrust of legislative intelligence, however much they may have relied on the wisdom of the popular sovereignty. Popular election indeed seems to have been the panacea in the minds of the members of the convention for all the evils of government. Not only all the state officers, all the judges and all the clerks are made elective, but many purely administrative officers. We should be glad to know

how the latter clause of the following section is to be made *practically* operative :

§ 2. A state engineer and surveyor shall be chosen at a general election, and shall hold his office two years, *but no person shall be elected to said office who is not a practical engineer.*

We cannot better close this article than by the Address of the Convention to the People. Its laudations, though great, are not, in our judgment, with the formidable exception of the judiciary article, very much overcharged. Its anticipations, though certainly very rose-colored, we sincerely hope may prove well-founded. For however freely we have here spoken of this instrument, our own interest, pride of country, and the ties of a common brotherhood, all lead us, in the fervour of a sincere patriotism, to pray for the prosperity of the active, intelligent, and virtuous community, who have committed their dearest interests to the control of the new constitution. The Address is in these words :

"The delegates of the people in convention, having terminated their deliberations, present to you the result of their labors in an amended constitution of fourteen articles, to be considered together, for your adoption. They have presented for your separate consideration, a section relative to suffrage, equally applicable to the present and proposed constitution.

"In these fourteen articles, they have reorganized the legislature ; established more limited districts for the election of the members of that body, and wholly separated it from the exercise of judicial power. The most important state officers have been made elective by the people of the state ; and most of the officers of cities, towns and counties, are made elective by the voters of the locality they serve. They have abolished a host of useless offices. They have sought at once to reduce and decentralize the patronage of the executive government. They have rendered inviolate the funds devoted to education. After repeated failures in the legislature, they have provided a judicial system, adequate to the wants of a free people, rapidly increasing in arts, culture, commerce and population. They have made provision for the payment of the whole state debt, and the completion of the public works begun. While that debt is in the progress of payment, they have provided a large contribution from the canal revenues towards the current expenses of the state, and sufficient for that purpose, when the state debt shall have been paid ; and have placed strong safeguards against the recurrence of debt, and the improvident expenditure of the public money. They have agreed on important provisions in relation to the mode of creating incorporations, and the liability of their members ; and have sought to render the business of banking more safe and responsible. They have incorporated many useful provisions more effectually to secure the people in their rights of person and property against the abuses of delegated power. They have modified the power of the legislature, with the direct consent of the people, to amend the constitution from time to time, and have secured to the people of the state, the right once in twenty years to pass directly on the question, whether they will call a convention for the revision of the constitution.

"These articles embrace all the provisions, agreed upon by the convention, to

constitute the constitution of the state. They are of course very numerous, often dependent one upon another, and can be best considered, as a whole; and the convention have not found it practicable to separate them into parts to be separately passed upon by the people. The convention have therefore presented the subject in the form that will best enable the people to judge between the old and the new constitution. If the constitution now proposed be adopted, the happiness and progress of the people of this state, will, under God, be in their own hands."

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### Recent American Decisions.

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*Supreme Judicial Court of Massachusetts, Suffolk County, March Term, 1846, at Boston.*

JOSHUA H. WARD, ASSIGNEE OF THOMAS CUSHING, v. NEHEMIAH P. MANN ET AL.<sup>1</sup>

Where a cause of action arises under certain rights acquired by a statute of the United States, and where there is not in the constitution, or the statute itself, a limitation or restriction confining the jurisdiction to the United States courts, the state courts may take cognizance of the action, if in other respects within their ordinary jurisdiction.

An action may be brought in a state court, by the assignee of a bankrupt, upon a contract or liability of a debtor of the bankrupt, contracted previous to the bankruptcy.

THIS was an action by the plaintiff, as assignee of Thomas Cushing, a bankrupt under the bankrupt law of the United States of 1841, upon a covenant made by the defendants with said Cushing, before his bankruptcy. The defendants appeared, and filed the following motion. "And now the said Nehemiah P. Mann, Solon Jenkins, and Richard Martin, move this honorable court to quash the writ and declaration in the above-named suit, because they say that it appears by the said writ or declaration, that the said Joshua H. Ward brings this suit as assignee under the late bankrupt law of the United States, of Thomas Cushing, a bankrupt, upon a co-

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<sup>1</sup> This case was briefly reported in a former number of the Law Reporter, (Vol. 8, p. 538.) Having recently received from Judge Dewey the opinion of the court as written out, we take great pleasure in publishing it *in extenso*.—Ed.

venant alleged to have been made by said Mann, Jenkins, and Martin to said Cushing before his bankruptcy; and that such a suit is only cognizable by the circuit and district courts of the United States. S. E. Sewall, Attorney of said Mann, Jenkins, and Martin."

The question arising thereon was argued by *Fletcher* and *Sewall* for the defendants, and *George Minot* for the plaintiff, and subsequently during the term the following opinion was delivered, overruling the motion.

DEWEY, J. The question raised in the present case is whether the assignee of a bankrupt under the bankrupt law of the United States, Stat. 1841, ch. 9, can maintain an action in the state courts of Massachusetts in his own name as such assignee, upon a contract under seal made by the defendants with the bankrupt before his bankruptcy.

The defendants insist that such action cannot be maintained, and this position they attempt to support upon two grounds. 1st. Upon general principles of constitutional law applicable to the jurisdiction of state courts in matters arising under statutes enacted by the congress of the United States. 2. Upon the effect to be given to the various provisions of the bankrupt act itself, which, it is contended, confers exclusive jurisdiction of all suits in relation to the property and debts of the bankrupt, upon the courts of the United States.

The first of these positions, it will be readily seen, opens a wide field for investigation, and upon a point as to which there has been some diversity of views; the question of the respective jurisdiction of the state and national tribunals, being one not always free from difficulty and doubt. It was early suggested, that under the provisions of the constitution of the United States, art. 3, providing "that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time order and establish," an exclusive jurisdiction in all matters arising under the laws of the United States would be assumed by the courts of the United States, to the manifest inconvenience of the citizens, and in derogation of the right of sovereignty of the individual states. But in opposition to this, the advocates of the constitution declared, "that in every case in which the state courts were not expressly excluded by the acts of the national legislation, the state courts will take cognizance of the causes to which those acts may give birth. The judiciary power of every government looks beyond its own local or municipal laws, and in

civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." (Federalist, No. 82.) Practically, it was soon found that the course of legislation by congress was sufficiently liberal in the matter of jurisdiction of the state courts, for in many instances direct enactments were made, authorizing not only civil actions in certain cases arising under the laws of the United States to be instituted in the state courts, but also conferring on the state courts to some extent a concurrent jurisdiction, in the matter of crimes and offences, arising wholly under the laws of the United States. To some extent a latitudinarian construction prevailed as to the extent of jurisdiction of the state courts, in the early period following the adoption of the constitution of the United States. The statutes of congress conferring upon the state courts the authority to take cognizance of criminal offences punishable only under such statutes, to sustain actions *qui tam* to recover penalties and forfeitures solely accruing under United States legislation, and others of like character, have in later periods been generally deemed unauthorized enactments. But actions upon contracts or bonds executed in reference to some duty or liability arising under a statute of the United States, and creating debts or obligations differing in no other respect from those within the ordinary state jurisdiction, have been directly sanctioned by judicial decisions. *United States v. Dodge*, (14 Johns. 95.)

The jurisdiction assumed by the state courts in matters arising under the United States' laws, has not been limited to the cases where jurisdiction has been expressly conferred upon them by the statute itself. Independently of any such source of authority given them in direct terms, it seems to have been always maintained, that where there was not in the constitution, or the statute itself, a limitation or restriction confining the jurisdiction to the United States' courts, and thus excluding state jurisdiction, the fact that the cause of action arose under certain rights acquired by a statute of the United States, was no sufficient objection to the jurisdiction of a state court. The practice under the earlier bankrupt law, (Stat. of April 4, 1800,) of instituting actions by assignees appointed under the provisions of that law, in the state courts, was very general, but I have searched in vain for any case where the right to institute such actions was controverted or denied. Cases of this character are found in *Brown v. Cummings*, (2 Caines, 33); *Barstow v. Adams*, (2 Day, 70); *Assignees of Barclay v. Carson*, (1 Haywood, 243); *Kelly v. Holdship*, (1 Brown Penn. R. 36); *Sullivan v. Bridge*, (1 Mass. R. 511.) These cases were strongly

contested, and many of them by eminent counsel. Though contested on the point of the right of the assignee to institute a suit, the objection relied upon was one arising from the nature of the claim in the particular case. The broader ground that an assignee of a bankrupt could in no case maintain an action in a state court, was not suggested, though equally fatal to the action, if that position be now well taken. I apprehend that the able and learned Commentaries of Chancellor Kent, and Mr. Justice Story, in which the question of state jurisdiction in matters arising under the United States' laws, is considered, will furnish no authority for sustaining the position that the state courts can exercise no jurisdiction in matters arising under the provisions of a statute of the United States. On the contrary, Mr. Justice Story (3 Com. on the Constitution, § 1749,) says, "Congress may indeed permit the state courts to exercise a concurrent jurisdiction in many cases, but those courts then derive no authority from congress over the subject-matter, but are simply left to the exercise of such jurisdiction as is conferred on them by the state constitution and laws." Chancellor Kent (vol. 1, p. 372,) says, "State courts may, in the exercise of their ordinary, original, and rightful jurisdiction, incidentally take cognizance of cases arising under the constitution, the laws and treaties of the United States."

And this, I suppose, is the true principle upon which the jurisdiction is in such cases exercised; not upon the ground of a judicial authority conferred as such by a law of the United States, but as the ordinary jurisdiction of the state court, acting indeed in the particular case upon legal rights which may have been created, or materially affected by the legislation of congress. The state courts are to give force and effect to a law of congress as the supreme law of the land. It is the law of Massachusetts, as much so as a statute enacted by her own legislature, deriving its vitality from another source, but of equal, and it may be a paramount authority.

These views furnish the answer to the argument for the defendants drawn from the course of decisions, which have so generally, but not universally been made in the state courts, denying the authority of assignees of a bankrupt under a foreign bankruptcy, to maintain actions in the state courts in their names, and in their capacity of assignees. These were cases of assignees created as such solely by foreign governments, and by force of laws not operative in the states composing our Union. To have permitted actions to be instituted by such assignees, would probably have required the giving full force and effect to the assignment in bankruptcy, in transferring the property of the bankrupt that might be

within our jurisdiction, to the prejudice of the interests of creditors living in this commonwealth. Probably much upon the same principle and for the same reason that we refuse to sustain actions in the name of administrators or executors appointed by the authority and under the laws of other states, that we may not aid in the withdrawal of assets from our own jurisdiction, without first securing the proper distribution among our domestic creditors.

But we stop here. We give full force and effect to the laws of other states creating bodies corporate, and investing certain individuals with power to sue in a corporate name. Nobody, we suppose, would doubt the propriety of maintaining an action in the name of a corporation, legally created such by a statute of the United States. Without pursuing the illustration further, we think, so far as the point under consideration is involved, the true principle is very clear. The national government has the power to pass a bankrupt law, to declare what shall constitute acts of bankruptcy, and under what circumstances a debtor shall be deprived of all personal control of his property, and to provide for the appointment of his legal representative, and vest in such representative all the rights of the bankrupt, as to the institution of suits at law in his own name, as fully and effectually as the same would vest in an administrator, appointed by the provisions of a state law. It was strongly urged, that to sustain the action would be in violation of the general rule, that a chose in action must be enforced by a suit in the name of the original promisee. But in truth there is no more a violation of this general principle in one case than the other. In both, the original party who should thus sue in his own name has ceased to exist, as a legal person capable of instituting a suit on the contract. The bankrupt law, sect. 3, vests all the property in the assignee, and confers upon him full power to sue, as full as the bankrupt had; and a debt due to the bankrupt from any person is such right of property, and does therefore vest in the assignee, as was held in *Mitchell v. Great Works Milling and Manufacturing Company*, (2 Story R. 658.) Such assignees thereby become the legal representative of the bankrupt, and entitled to sue in their own names in the capacity of assignees, and this by force of a general law having effect throughout the whole Union.

2. We are then brought to the second question, whether the statute itself (St. 1841, c. 9,) has given exclusive jurisdiction in all that concerns the property, real and personal, of the bankrupt, to the courts of the United States. So many practical inconveniences would result from such a construction of the statute, and it is so far at variance with the ordinary course of legislation, in withdrawing the col-

lection of debts from the local tribunals, that it may reasonably be required that the party asserting the proposition should establish it by clear and obvious provisions, found in the terms of the statute. This exclusive jurisdiction in the courts of the United States is supposed to be conferred by the provisions of the 6th sect. of the act, "that the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act," and in the further provision in the same section giving jurisdiction "as to all acts, matters and things to be done under and in virtue of the bankruptcy." It is conceded, that here is given full jurisdiction to the district courts in the matter above recited; but this may be so, and yet the jurisdiction may not be exclusive, as the words of the statute may have their full force and effect without construing them as imposing absolute restrictions upon the state courts in the matter of jurisdiction in the same subjects. The provision of the third section, that "the assignees may sue and defend, subject to the orders and directions of such court," is cited as sustaining the exclusive jurisdiction of the courts of the United States, in all suits, but fails of sustaining that position. In the case *Ex parte Christy*, (3 Howard, 319,) Story, J. in giving the opinion of the court, seems to consider that the phrase "subject to the orders and directions of the district court," was intended to give the district court supervision over cases pending in the state courts, as well as those pending in the district courts. Not that the state courts might not entertain jurisdiction in relation to the property of the bankrupt, or aid in enforcing the collection of debts due the bankrupt, but that such suits while pending in the state courts were under the control and supervision of the courts of the United States. "Congress," it is said, "did not intend to trust the working of the bankrupt system solely to the courts of twenty-six states." In the diversity of views which have existed upon the subject of the supervision that may be exercised over the proceedings in the state courts by the United States courts, no judicial opinions that have been given have assumed the position, that the state courts were absolutely excluded from entertaining suits concerning the property or debts of a bankrupt. The point of controversy has been, not whether the state courts might not take jurisdiction of suits in relation to the property of the bankrupt, when acting in cooperation with the courts of the United States, and governed by their decisions, and applying their rules of law, but whether the United States courts had not a controlling power that might be exercised. See *Mitchel v. Great Works Milling and Manufacturing Company*, (2 Story R. 658.)

It was further urged in the arguments for the defendants, that the provisions of sect. 8 of the bankrupt act, that no suit at law or in equity shall in any case be maintained touching the property of the bankrupt "in any courts whatever, unless the same shall be brought within two years after the declaration and decree of bankruptcy," clearly supposes that an exclusive jurisdiction of all suits, in a matter concerning the property of a bankrupt, is vested in the courts of the United States. We do not perceive that this consequence follows. If the provision be a general one, as its words import, and it is intended to apply to all cases in bankruptcy, it is a statute of binding efficacy everywhere, and will be regarded as well in the state courts as in those of the United States. It will not, like the ordinary statute of limitations, be deemed a local law to be administered in the particular local state in which it was enacted, but a general law, applicable to each and every state of the Union, and to be of force and effect in all courts, state and national.

As yet, the statute is too recent to authorize us to expect, in the volumes of the reports of the various state courts that have been published, to find many cases of suits by assignees under the bankrupt act of 1841. We doubt not that many such suits will appear hereafter. Two such cases are already before us. In the matter of *Cornwell*, (7 Watts & Serg. 305,) where a question arose as to the right of property in the avails of certain real estate, the assignees of a bankrupt were parties, claiming the same in their capacity of assignees, and their claim was allowed, and the money ordered to be paid to them. In *Laflin v. Day*, (6 Met. 280,) a writ of error was sued out by an assignee, and though contested on other grounds, neither in this or the preceding case was any doubt suggested as to the jurisdiction of a state court, of an action by an assignee on contracts and liabilities of the debtors of the bankrupt. The result to which we come is that the state courts have jurisdiction in cases like the present. That no exclusive jurisdiction in suits concerning the property of the bankrupt attaches to the courts of the United States, in consequence of the rights of the assignee being acquired wholly under a law of the United States; nor is it created by any provisions of the act itself limiting and restraining suits by assignees, and requiring them to be instituted exclusively in the courts of the United States.

Motion to dismiss overruled.

*Supreme Judicial Court, Massachusetts, January, 1847, at Boston.*

IN THE MATTER OF JOSEPH W. KIMBALL, PATRICK MURRAY, AND  
STONE.

The volunteers, raised under the act of congress of May, 1846, providing for the raising of military forces for the Mexican war, are not militia, nor a part of the regular army, but a distinct species of the military force of the United States, partaking somewhat of the character of both.

The raising of such a volunteer force, by congress, is constitutional.

The enlistment in such volunteer force is in the nature of a contract; and the obligation of the volunteers to serve depends upon that contract.

The enlistment of minors in such volunteer companies, without the consent of their parents, masters or guardians, is invalid.

Whether the appointment of the officers, in a company composing a part of such volunteer force, by the governor of the state in which the company is raised, is constitutional or legal, — *quære?* But the volunteers are estopped taking advantage of the objection on *habeas corpus*.

*It seems*, that under the act of 1846, it is optional with the government, to make the election, in the outset, that the volunteers shall serve during the war; and if the volunteers enlist with notice of such election, they are bound by their assent.

THESE were cases of *habeas corpus*. Kimball and Murray were two minors, who had enlisted in company B of the first regiment of Massachusetts volunteers for the Mexican war, commanded by Captain Wright, and had been mustered into service. The case of Kimball was commenced by the petition of his father. Murray was an alien, and, at the time of his enlistment, was in the employ and under the charge of James Dorcey, as an apprentice. Subsequent to his enlistment, letters of guardianship were taken out by Dorcey, and Murray was brought in upon his petition. Both of these boys had enlisted without the consent of their parents or guardians. The claim of Kimball to be discharged rested mainly on the fact of his minority. Murray's discharge was claimed upon the same ground, and on the additional one of his being a British subject.

Stone was also a minor, who had enlisted and had been mustered in company A, (Captain Webster's.) He was brought in on the petition of his mother. The points raised by his counsel were the following: — (1) That the forces contemplated to be raised by the act of congress of May, 1846, if they have any constitutional existence, are not of the "militia," but of the "army," or general military force of the United States; — (2) That the provisions of the act, directing that certain officers "shall be appointed in the manner prescribed by law in the several states and

territories, to which the companies shall respectively belong," is unconstitutional; inasmuch as the constitution of the United States expressly says that officers of the United States shall be nominated, and, by and with the advice and consent of the senate, shall be appointed, by the president of the United States. That the officers commissioned by the governor of Massachusetts have no right to detain the petitioners; nor are the petitioners in any way bound by their contract of enlistment. That the president was to accept the volunteers in "companies," not as individuals; that therefore the offer of the "company," and the contract of enlistment founded thereon, were void, — the officers not being appointed in pursuance of the provisions of the constitution of the United States, and the said company having no constitutional existence. (3) That the contract of enlistment is *illegal*, by the action of the federal government, inasmuch as the act of congress provides, that it shall be for "twelve months or during the war," whereas, by the direction of the secretary of war, it is "during the war." (4) That it is *illegal* by the action of the state government, inasmuch as it has been entered into by a wrongful use and perversion of the militia laws of the commonwealth, so as to be a fraud upon those laws. (5) That minors are not bound by their contract of enlistment under the act of May, 1846.

*Benjamin Rand*, for Kimball.

*Thomas H. Russell*, for Murray.

*Charles Sumner* and *John A. Andrew*, for Stone.

*Charles L. Woodbury*, for the respondents.

SHAW, C. J. delivered the opinion of the court. He said that it was obviously a matter of regret, that questions of so high importance, involving the construction of the constitution of this state, and that of the United States, should arise upon a summary process, like this, which rendered it necessary to decide those questions promptly, and without the thorough and careful investigation which was desirable.

The first question was, whether, in this particular species of service, minors could enter into a binding engagement to serve, without the consent of their parents, masters or guardians. The respondents contended that they could do so, whether these volunteers were to be considered as militia, or as United States troops; that congress had the power to make laws, and had made laws, providing for such enlistment. The petitioners contended, that if congress had such power, they must exercise it in express terms. The

question in relation to minors in the naval service came before this court in the case of *Commonwealth v. Downes*, (24 Pick. R. 227,) and it was then decided, that if a minor be enlisted, under an act of congress, in the army or navy, without the consent of his father or guardian, the court will discharge him from such enlistment, upon the application of the father or guardian, unless it appear, by the express words of the act, or by necessary implication, that congress intended to dispense with the necessity of such assent. The argument was this. The army was to be filled by enlistment. The enlistment was a contract. That contract depended on the statute under which the enlistment was made. The statute was in the nature of an offer, and the enlistment was an acceptance of that offer; and when completed, it had all the elements of a contract. When the law provided for enlistment by contract, it implied that the contract should be made with persons capable of making it. There were two objections against the capacity of minors to make such a contract. (1) By the common law, under which the social relations and capacities of persons were determined in the several states, — for those were not fixed by statute, but the laws of the state had so far adopted the common law by necessary implication, — by the common law, then, minors were not competent to enter into contracts for the employment of their time, nor to incur obligations that would be binding, except with certain exceptions, such as those which were for their own benefit. (2) The other reason was, that other persons, their parents, masters and guardians, had a right of control, and of direction over them, and of the superintendence of their education.

The precise question was, whether the acts of congress giving authority to enlist, in general terms, without specifying whether minors should or should not have the power to enlist, did, of necessity, embrace minors. The court were strongly inclined to think, that congress had the power to pass an act, which should give minors the capacity to enlist, without the consent of their parents or guardians, in a case of urgent necessity. But the question here was, whether minors were included in the general terms of such acts, without express words. The tendency of the authorities, and of legislation upon this subject, went to show that they were not. Acts had been passed, in express terms giving minors this capacity. In December, 1814, during the darkest period of the last war with England, it being necessary to fill the ranks of the army, an act was passed, repealing a previous statute which required the consent of parents and guardians, and providing with great care that minors might be enlisted without such consent. This law was re-

pealed in March, 1815, having been in force only about four months; and peace having been made in the mean time, so that the public, urgent necessity no longer existed. This act carefully provided for the rights of those enlisting, and gave them four days to reconsider, and to withdraw, if, upon sober, second thought, they should so elect; and also provided, that in the case of an apprentice enlisting without the consent of his master, the latter should be entitled to receive a proportion of the bounty money. The passage of acts, including minors in express terms, would seem to exclude the conclusion, that an enlistment without the consent of parents, masters, or guardians was authorized, by the general terms of the act of 1846. Supposing, therefore, that this is not militia service, and depends upon the stipulations of the party himself, a minor cannot be held by his enlistment, made without the consent of his parent, master or guardian. But in the militia service, he may be so held.

The second question, therefore, was whether the volunteer was a militia man. The distinction between the regular army and the militia was carefully marked by the constitution. The government had the power to raise and maintain an "army;" and also to employ the "militia" in certain exigencies, as to suppress insurrection, to repel invasion, and to execute the laws. It had been argued, that every species of military force must fall under one of these two great heads. The court could not conceive it so. These were the two most important branches of military force;—but under the general authority of congress to maintain an army, which the court thought should have a broad and liberal construction, they had power to raise any species of military force which should be found necessary. The act of May, 1846, provided distinctly for the employment of the militia, naval and military forces of the United States, and also for the raising of 50,000 volunteers. The latter appeared to be a distinct class of military force, partaking partly of the character of both of the two great classes. This act necessarily implied some means of organizing these volunteers, by which they should be formed into companies and regiments. The provision that the officers were to be appointed according to the laws of the states, was intended to adopt the laws of the several states, to that extent and for that purpose.

This species of military force was intended to supersede the necessity of a draft. A draft of the militia was a selection by lot, and the essence of the employment was this designation, and not a contract. But in the case of these volunteers, the foundation of their liability was their own voluntary undertaking,—their own contract. Their term of engagement was a different period from

that provided by law for the militia. The whole body of the Massachusetts militia were considered as enrolled, and a certain portion of them were formed into volunteer companies, charged with particular duties, but still being militia, and their liabilities being limited as militia. They were very different from the present volunteers, who were engaged to serve in a separate and distinct service.

The court thought it was competent for congress to authorize this species of military force, and for them to engage to serve. They did not call them the regular army; but they were not "militia," and were only held by the voluntary engagement of the individuals. The raising of this force was a great relief to the body of militia, to whom it would have been a great hardship to be drawn from their business and regular pursuits. A substitute was found, by permitting those, themselves perhaps members of the militia, but willing to serve as volunteers, to enlist in this service.

It was their own undertaking which bound them to serve beyond the term of six months, provided by law as the term of militia service. It appeared to the court, that all who had enlisted, whether over or under twenty-one years of age, had engaged with their own consent. It had been argued that they had not, and that they were only companies of militia. This seemed, to the court, to be contrary to the intent and spirit of the act. The case appeared to be this. A proclamation had been made by the military authority of the state, giving notice of the call for volunteers. These individuals became members of their several companies, with the understanding that this proclamation had been made. They made an offer of their services to the government, and the offer had been accepted. This constituted a contract. They enlisted under the act of 1846, their enlistment was accepted, and they were received into the service of the United States. They were styled, in the muster roll, not Massachusetts militia, not the army of the United States, but Massachusetts volunteers, called into the service of the United States by the president, under the act of May, 1846, and to serve during the war with Mexico.

It had been argued, that no one was bound by the enlistment, because it was unconstitutional and illegal. The court would always approach with great caution the decision of a question, involving the constitutionality of a statute, enacted under the regular forms of procedure, even in the case of an act of the state legislature, and much more so in the case of an act of congress. In a case of manifest usurpation of authority, the judiciary were bound to declare it such, without regard to consequences; but it must be a clear case, there must be time for deliberate examination, and it must appear

to be manifestly a usurpation of power, before the court will pronounce it unconstitutional. It was objected, that these volunteers were not engaged in a manner contemplated by the constitution, and that the mode of organization was illegal. The provision of the act of 1846, that the volunteers were to serve for one year, or during the war, unless sooner discharged, was somewhat ambiguous, but it would seem that it might be optional with the government to make the election, in the outset, whether the volunteers should serve for one year, or should serve during the war. They had made the election, and the volunteers had assented to it, by enlisting on those terms.

In regard to the legality of the mode of organizing the companies, the court had not thought it necessary to come to a decisive opinion. Some of the court thought the organization legal and regular. Others entertained doubts; and as the question was one of importance, and one which would require research and deliberation, the court had postponed it, until such time as it should become necessary to decide it. But they were of opinion, that this was an objection which these petitioners were not entitled to make, on this summary process. There were two distinct questions which had been made, (1) whether the volunteers were bound to serve, and (2) whether the organization was legal. The court held that congress had a right to constitute this species of military force, and had done so. But it was a very grave question,—at least it seemed so to a portion of the court,—whether, whenever a part of the United States army, or a ship of war, should come within the jurisdiction of Massachusetts, any one of the men might call in question the regularity of the authority or organization under which they were held, on the summary process of habeas corpus. But however that might be, the petitioners were bound by their engagement, and could not avail themselves of this objection, on this process.

The petitioners were bound, not as militia, but by their own engagement, and if minors, they could not be held, unless their enlistment had been with the consent of their parents, masters or guardians. Those of the petitioners, therefore, who were within this predicament, were entitled to a discharge.

Kimball and Murray appearing, by the evidence in the case, to come within the principles laid down by the court, were ordered to be discharged. There having been no evidence upon this point submitted to the court in the case of Stone, it became necessary to inquire farther into the facts.

*Supreme Judicial Court, Massachusetts, February, 1847, at Boston.*

JAMES HUNNEWELL, PETITIONER.

WHETHER the supreme judicial court of Massachusetts have the power to issue writs of prohibition, to any persons or corporations, except to judicial tribunals, or to persons or bodies exercising powers judicial or quasi judicial,—*quære*.

Towns have not the power to raise and appropriate money by vote, for any purposes, except for those for which the power has been given them by statute, or has been exercised by ancient, uniform and well established custom.

A writ of prohibition is a proceeding at law, and the petition must be heard and tried in the county in which the parties live. But, when there is no court sitting at the time, in that county, the petition may be presented in another county, and made returnable in the proper county.

The decision in *Stetson v. Kempton*, (13 Mass. 272,) that towns have no authority, in time of war and danger from hostile invasion, to raise money to give additional wages to the militia, and for other purposes of defence, affirmed.

THIS was an application to the court, to grant a writ of prohibition, directed to the treasurer of the town of Charlestown, and an executive committee chosen in a town meeting, in order to restrain and prohibit them from paying out the sum of fifteen hundred dollars, which had been voted by the town, to be paid by the treasurer, out of any moneys in the town treasury, to the executive committee aforesaid, to be distributed to the company of volunteers, raised in that town for the Mexican war. It was argued *ex parte*, by S. Bartlett and George Farrar for the petitioner; there being no appearance on behalf of the officers of the town.

SHAW, C. J. delivered the opinion of the court. He repeated the remark, recently made in the case of habeas corpus the other day, that it was matter of regret, that questions of the highest importance, and entirely novel, should be presented to the court in a shape requiring an immediate decision, without opportunity for deliberation and research. This was the first instance in which the court had been called upon to grant a writ of prohibition, for any reasons similar to those upon which the present application was founded. By the statute of 1782, ch. 9, establishing the supreme judicial court, it was provided that "said court shall have power to issue all writs of prohibition and mandamus, according to the law of the land, to all courts of inferior judiciary powers, and all processes necessary to the furtherance of justice, and the regular execution of the laws." By the Revised Statutes, chapter 81, section 5, it was provided, that "they shall have power to issue writs of error,

certiorari, mandamus, prohibition and quo warranto, and all other writs and processes, to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice, and the regular execution of the laws." The petitioner contended that the powers of the court were enlarged by the Revised Statutes, so that they could issue writs of mandamus, certiorari and prohibition, not only to courts and tribunals, but to other persons. There was some question, however, whether it was intended to enlarge the powers of the court in that respect, or whether anything more was intended, than that those writs should be issued, in cases where they were, by law, the proper remedy.

A writ of prohibition was a remedy adapted to the purpose of restraining courts of limited and inferior jurisdiction, justices of the peace, selectmen when exercising judicial powers, and persons exercising powers, judicial, or quasi judicial. No case had heretofore arisen, in which it had become necessary to decide the question, whether this power extended to other persons or corporations. The cases where courts or persons exercising judicial or quasi judicial functions might be restrained by a writ of prohibition, were (1) where they assumed a jurisdiction which they had no right to exercise; and (2) where they had jurisdiction, but exercised it in a manner unauthorized by the law. The case of *Washburn v. Phillips*, (2 Mete. R. 296,) was the case of a court-martial; and the application was made on the ground that the court was illegally constituted. The petition in that case was dismissed, and the present question was not decided. The remarks of the court in that case were to be construed in reference to the particular circumstances of the case in which they arose. A court-martial was a judicial tribunal, having a peculiar jurisdiction. The case of *The Inhabitants of Rutland v. The County Commissioners of Worcester*, (20 Pick. R. 71) was the case of a body, exercising quasi judicial powers. The county commissioners were entrusted with certain powers formerly exercised by a judicial tribunal, namely, the court of sessions. The writ of prohibition did not issue in that case, because, on inquiry into the merits, it appeared that there was no occasion for it. These were the two principal cases which had yet occurred. In the case of *Hale and others v. Cushman and others*, (6 Mete. R. 425,) an application was made to restrain the officers of a town, where the town had voted to raise money, to indemnify the selectmen for their expenses in defending a suit, brought against them, for refusing to receive the vote of one of the plaintiffs at an election. But that was a bill in equity for an injunction; and the

injunction was refused, on the ground that the equity jurisdiction of the court did not extend to the case. These cases were mentioned, to show how few and far between these applications had been, and that there had been no settled or established practice upon the subject.

The present case was an application to restrain the officers of the town from paying out the sum of fifteen hundred dollars from the treasury of the town, for purposes, for which, it was alleged, the town had no legal authority to appropriate the same. In the case of *Stetson v. Kempton*, (13 Mass. R. 272,) the right of towns to appropriate money for the purposes of assisting in the public defence, was considered upon the largest and broadest views. That was the case of a maritime town, Fairhaven, which was exposed to attack from the British forces, then supposed to be hovering on the coast, during the last war. The town voted to raise money as a premium for enlistment. But it was decided that they had not the power; that the town was incorporated for limited purposes; that their power to raise money by taxation was limited,—not as to the amount,—but as to the purposes of expenditure. This great principle had always been recognized and acted upon; and the only difficulties that had arisen, had been in the application of it to the facts of each particular case. The principle was this: that towns had the power to raise money for purposes for which the power was given them by the statute, or for which the power had been exercised, by ancient, uniform and well established custom; and for those purposes only.

It would seem, *prima facie*, that the vote of the town of Charlestown was unauthorized by law. But the question of illegality had not been argued; there had been no appearance for the town authorities; and the counsel had not therefore thought it necessary to go into that question. Whether there were any peculiar circumstances attending this vote, to take it out of the principle of the case of *Stetson v. Kempton*, did not appear; and it having been decided in that case, that a vote to raise money as a premium for enlistment, to defend the town against a threatened invasion, and for other purposes of defence, was illegal, it would seem, *a fortiori*, that a vote to raise money for volunteers for a distant war in Mexico, would be unauthorized. But the question was, what could be done in the present case? And this was a question of difficulty.

A petition for a writ of prohibition was a proceeding at law; and as such, ought to have been commenced and prosecuted in the county in which the parties reside. All the parties live in Middlesex county. The court had not decided, and did not now mean

to decide, whether, in a case like the present, if properly before the court, in the proper county, a writ of prohibition would lie. But this case could not be tried in this county. It was a proceeding at law, and must be tried in the proper forum. It might involve questions of fact as well as of law. The course of proceedings, in applications for a writ of prohibition, was this: the respondent party was summoned, and if he appeared, the petitioner put in the form of a declaration the grounds on which he rested his claim. Then the respondent might plead; he might either demur, or traverse and deny the facts alleged; and if so, the question was to be tried in the usual course of proceedings at law.

If it was urged, that this was then an insufficient remedy, the answer was, that a writ of prohibition afforded no other remedy; and if no other was afforded by law, it was for the legislature to supply the deficiency. No rule applicable to the case could be drawn from analogy with the rules of equity.

The court would not be understood, by anything here said, to prejudge either of the two questions in this case, (1) whether the vote of the town was illegal and unauthorized, and (2) whether a writ of prohibition was the proper remedy. They preferred to settle questions of so much importance in a more deliberate manner. But there was, at least, so much ground in support of the petition, that the court thought proper to follow the analogy of the practice in petitions for certiorari, which had been permitted to be presented in another county from that in which the parties lived, and made returnable in the proper county. Whatever was done, would at least be done in the proper forum, and with due notice. *This* was not the proper tribunal to consider the question. The court did not postpone the case merely to have time for consideration, but in order that it might be tried before the proper tribunal. Nor did they entertain any doubt of the correctness of the decision in the case of *Stetson v. Kempton*.

The petition should be amended so as to state the names of the executive committee; and as there was now a vacation in Middlesex county, and the court would not again sit there until the second Tuesday of April, an order would be made, that the petition be entered at the term of the supreme judicial court, next to be held at Lowell, within and for the county of Middlesex, on the second Tuesday of April next; and that notice of the same be duly served on the treasurer, and on each member of the executive committee, designating them by name, place and addition, thirty days at least before the first day of said term.

*District Court of the United States, Massachusetts District, January, 1847, at Boston.*

BAMFIELD, PETITIONER, *v.* ABBOT.

A minor, who enlisted in one of the volunteer companies, raised under the act of congress of May, 1846, providing for the raising of military forces for the Mexican war, but which company has not yet been mustered into the service of the United States, or received or accepted by any officer thereof, and has not received any rations or clothing therefrom, cannot be held in custody as a volunteer, under the law of the United States.

Nor can such minor be held under the statute of Massachusetts of 1840, ch. 92, sec. 5, which provides for the ordering out of the militia, by draft or otherwise.

THIS was a writ of habeas corpus to bring up the body of Robert C. Rowe. The first question raised was, whether the courts or judges of the United States have jurisdiction to inquire into the cause of detention. The petitioner set forth that he was the legal guardian of the said Rowe, who was a minor, and restrained of his liberty by the respondent, as commander of a company of volunteers, enlisted in the United States service in the war against Mexico, claiming to hold him by virtue of a pretended engagement on the part of said ward to serve in said war under the command of the respondent. The return of the respondent did not deny any of the allegations in the petition, but set forth that the cause of the detention of the said Rowe was, that he voluntarily enlisted and was mustered in Company C of the First Regiment Massachusetts Volunteers, on the 28th day of December last, and has received his rations and clothing since that date.

*N. T. Dow*, for the petitioner.

*Rantoul*, for the respondent.

SPRAGUE, J. The return is not full and explicit, in the statement of facts, and at the hearing I stated to the learned counsel for the respondent, that by its language I understood that the respondent claimed the custody and control of the said Rowe as a volunteer soldier, who had been mustered into the service of the United States and received from them clothing and rations as such, under the Act of 1846. And I suggested that if that was not the ground on which the respondent intended to rest his claim, the return might be amended so as to present the facts as he wished to have them

understood, and time was given to the counsel for that purpose. The respondent, however, has not seen fit to make any amendment or addition to his return, and I must take it as asserting a claim to hold the said Rowe in custody as a volunteer under the law of the United States. Under this petition and return, therefore, I cannot doubt that it is my duty to inquire into the cause of detention.

It appears that the said Rowe is now between 18 and 19 years of age; that previous to the fourteenth of November last, his residence had from his birth been in the state of New Hampshire; that both his parents died more than two years ago; that in the summer of 1846, the petitioner was appointed his guardian, and that both had resided in the town of Dover in that state, but that the guardian had not interfered with the labor or earnings of the ward. But the said Rowe left Dover on or about the 14th of November, without the consent of his guardian, who had no knowledge where he had gone until a week or ten days ago, when he heard that he was in Boston, and had enlisted as a volunteer. On the 28th of December last, he enlisted as a member of company C. of the Massachusetts infantry, which was subsequently organized under the authority of the governor of Massachusetts, and the officers were commissioned by him. But the original enlistment, and the whole proceedings, were for the express and sole purpose of having the said company received into the service of the United States as volunteers under the act of congress for 1846. And that for this purpose the said Rowe and about forty-five others, had been examined by a captain and surgeon of the United States army, who had certified to their physical qualifications, and that they had been, by order of the respondent, as captain of said company, held under military discipline, at quarters in the city of Boston, and not allowed to depart from those quarters except by the order or special permission of the respondent, with a view of having them mustered into the service of the United States as volunteers, but for want of a sufficient number of men, the said company had not in any manner been mustered into the service of the United States, or been received or accepted by any officer thereof, or received any rations or clothing therefrom. The said Rowe has not then come under the authority of the president or any officer of the United States, and I do not understand the learned counsel as contending that he can be held by the respondent under the act of congress of 1846.

But it is insisted that he may be held under the Massachusetts statute of 1840, ch. 92, sec. 5. In the first place, that section refers to the dormant and not to the active militia of Massachusetts. In the next place, no order of the commander-in-chief of the

commonwealth, or any other officer, is shown, calling forth the militia or placing them in a state of preparation for actual service, as contended for. And thirdly, the return of the respondent does not rest his claim to hold the said Rowe in confinement upon any such ground, and in this respect the return is not inconsistent with the evidence. Whether the said Rowe has subjected himself to the duties imposed by the laws of Massachusetts upon the militia of that state, I am not called upon to decide, and express no opinion.

The claim of the respondent being in my opinion not sanctioned by law, and the said Rowe having declared his wish to be discharged, I am bound to order that he be set at liberty.

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*Circuit Court, Morris County, New Jersey, November Term, 1846.*

JOHN H. DAVIS *v.* CHRISTOPHER YOUNG.

In actions of slander the defendant will be permitted, under the general issue, to prove common reports of the guilt of the plaintiff in mitigation of damages. Also evidence of the plaintiff's character may be offered on either side to affect the amount of damages.

THIS was an action on the case for five thousand dollars, brought by the plaintiff to recover damages for words spoken by the defendant, in charging him with being connected with the murder of the Castner family. Declaration in the common form. Plea, general issue.

The defendant offered to prove that all the actionable words contained in the declaration were general reports in the neighborhood where the parties lived prior to the time of their being spoken by the defendant; also, that the plaintiff's general character was bad. To the admission of this evidence the plaintiff objected.

*E. W. Whelpley* and *J. W. Miller*, for the plaintiff.

*H. A. Ford* and *J. S. Hager*, for the defendant.

WHITEHEAD, J. held, that from the authorities, it appears that it is not universally agreed whether under the general issue general reports of the plaintiff's guilt are admissible: that in England, Pennsylvania, Kentucky, and South Carolina, such evidence is admitted, and in New York, Massachusetts, and Virginia it is not. (2 Star. on Slan. 84, note (1) by Wendell; 2 Gr. Ev. § 275, and note 2, § 424, and authorities there cited); that there is an old case in this state (1 Pennington's R. 167.) where it is decided by a majority of the supreme court, that such evidence is admissible. That in the present case the defendant might, *in mitigation of damages*, give in evidence that there were *general* reports in circulation connecting the plaintiff with the murders; but that the evidence must be confined to this. The particulars of such reports could not be inquired into by defendant. That the plaintiff's *general character* was in question, and evidence might be given on either side to affect the amount of damages.

## Digest of American Cases.

Selections from 2 Washburn's (Vermont) Reports, continued from page 472.

### CHANCERY.

4. A contract, by which the defendant agreed to deed certain lands to a married woman, on payment by her of a note executed by her husband, cannot be connected with other independent contracts or notes held by the defendant against the husband, so as to render the insolvency of the husband, or his inability to perform his contract, any excuse for the defendant in not performing his contract with the wife. *Washburn et ux. v. Dewey*, 92.

5. A tender of performance of a condition precedent, as the payment of a note, entitles the party to a performance on the other side; and no farther offer is required, nor is it necessary to bring the money into court, until the defendant demands it. *Id.*

6. Where arbitrators awarded that the orator should pay to the defendant a certain sum of money by a time specified, and that the defendant should, at the same time, execute to the orator a deed of certain premises, and the defendant, at the day, tendered to the orator the required deed, which the orator refused to accept, and the defendant thereupon commenced an action at law against the orator upon the award, and recovered judgment for the sum awarded to be paid to him and his costs, and afterwards the defendant sold and transferred the premises to a third person, receiving the value thereof, the court enjoined the defendant from any farther proceedings to enforce payment of the judgment recovered by him at law, and ordered that he repay to the orator the amount of a payment which the orator had made to him towards the land prior to the award, and which was taken into consideration by the arbitrators, and

also that he pay the orator's costs. But the defendant was allowed to deduct, from the payment to be made by him, the amount of his costs in the suit at law, — the court holding that that judgment was rightly recovered, as the facts then were. *Preston v. Whitcomb*, 183.

7. The court of chancery have no power to enjoin a judgment of the supreme court, where the ground for relief, set up in the orator's bill, is, that the supreme court, through haste, or inadvertence, rendered an erroneous decision. *Pettes et al. v. Bank of Whitehall*, 435.

8. The court of chancery will decree a set-off of debts, in fact mutual, although not so in form, — as when, on one side, the debts are joint, and, upon the other side, several, — if one of the joint debtors is a mere surety, — especially when he, from whom the several debt is due, and against whom the set-off is asked by the real debtor in the joint debt, is insolvent. *Downer v. Dana et al.* 518.

### CONDITION.

A contract of sale, upon condition, vests no title in the vendee until the performance of such condition, unless the performance is waived. *Maxwell, Ad'x. v. Briggs*, 176.

2. A mere mental determination to rest satisfied with the non-performance of such condition, not procured by the vendee nor notified to him, will not operate as a waiver of such condition, so as to vest the property in the article sold in the vendee. *Id.*

### CONTRACT.

A contract in contravention of the terms of a statute is void, although the

statute inflict a penalty, only; because such penalty implies a prohibition. *Elkins v. Parkhurst*, 105.

2. A contract entered into to indemnify a sheriff for a past neglect is not void for illegality. *Hall v. Huntoon*, 244.

3. Where the defendant contracted to deliver to the plaintiffs thirty tons of starch per year for two years, it was held that the contract, though entire in its terms, was yet divisible in its character, and that the plaintiffs might, at the expiration of the first year, sustain an action against the defendant for any breach on his part, of that portion of the contract that was to be performed that year. *Mixer et al. v. Williams*, 457.

#### CRIMINAL LAW.

If resistance be made to the making of an attachment, the persons resisting will not be allowed, on trial of an indictment against them therefor, to prove in defence, that the process, upon which the attachment was about being made, was sued out by connivance of the plaintiff and defendant therein and of the officer, and was intended to be used by them for the purpose of placing the property attached, which belonged to one of the respondents, in the hands of insolvent and irresponsible persons, so as to deprive the owner of his property, or fraudulently compel him to pay money in order to regain the possession of it. *State v. Buchanan et al.* 573.

2. And, after a general verdict of guilty, it is no objection to the indictment, on motion in arrest, that offences of different grades, and requiring different punishments, are charged in the different counts. If any one or more of the counts are sufficient, the court will render judgment upon such counts; and if all the counts are sufficient, judgment will be rendered upon the count charging the highest offence. *State v. Hooker*, 658.

#### DEPOSITION.

Where a deposition was taken and filed, to be used as evidence in a suit, and the original deposition was destroyed by accident, it was held that a copy of the deposition, — the witness being still living, — could not be used as evi-

dence on the trial. *Follett et al. v. Murray et al.* & Tr. 530.

#### EVIDENCE.

Where, in an action for slanderous words, there was an attempt on the part of the defendant to impeach the credit of the witnesses by whom the speaking was proved, it was held that the plaintiff was entitled to prove, as tending to sustain the credibility of the witnesses, that the witnesses resided in the state of New York, and that the defendant had, by *solicitation, money, and threats*, endeavored to induce them to decline attending court and testifying in the case. *HEARD, J.*, dissenting. *Kirkaldie v. Page*, 256.

2. The declarations of the vendor of personal property, as to the character of the sale made by him, are not evidence against the vendee, in an action of trespass brought by the vendee against the creditors of the vendor, who have attached the property as belonging to the vendor, notwithstanding such declarations were made before the attachment, and while the vendor still retained the property in his possession. *Ellis v. Howard et al.* 330.

3. If a hearing be had before a magistrate, upon the complaint of a town grand juror charging a person with the commission of a crime, and the respondent be, by the magistrate, bound over for trial by the county court, and an indictment be found against him, and, before a trial is had upon the indictment, a witness, who testified before the magistrate, dies, evidence may be received, on trial upon the indictment, to prove what that witness testified before the magistrate. *State v. Hooker*, 658.

4. And it is not necessary, on such trial, to prove the exact language used by the witness in giving his testimony before the magistrate; it is sufficient, if the substance of his testimony, as there given, be detailed. *Id.*

#### FEES.

An officer, who receives illegal fees, is not liable to the penalty imposed by sec. 16 of chap. 106 of the Revised Statutes, unless he received such illegal fees *knowingly*. In this respect the sixteenth section must have the same construction with the fourteenth and fifteenth sections. *Henry v. Tilson*, 479.

## FIXTURES.

Buildings erected for a temporary use, or barns, erected by persons other than the owner, and not intended for permanent fixtures, may, in some cases, be considered and treated as personal property; but, as between vendor and vendee, heir and executor, mortgagor and mortgagee, all buildings which enhance the value of the estate, and are designed to be occupied by the owner thereof, agreeable to the principles of the common law, become a part of the realty, and pass with it by deed, or by descent. *Leland, Adm'r. v. Gassett*, 403.

2. If personal property be attached by a third person to a building, of which such third person is the owner, and used as part of the furniture of the building, for the convenience of the business of its occupants, but be attached in such manner, that it can be removed without injury to the building, and without injury to the property, it does not thereby become a part of the free-hold, so as to pass by deed from the owner of the building to a purchaser of the premises. *Cross v. Marston*, 533.

## HIGHWAYS.

When a new road has been laid and worked in a town, the discontinuing the old road by the selectmen, and the leaving the new road open for travel, and thus compelling the travel to go upon the new road, are acts so unequivocal in their character, and so inconsistent with any other rational intent of the selectmen, than that the road shall be an open highway, as to be *legitimate evidence* that the road has been opened by the town and devoted to public use, so as to make the town liable for any damages arising from the insufficiency, or want of repair, of such road. *Blodgett v. Roylton*, 40.

## INSANITY.

That the defendant, in an action for a tort, was insane, at the time of committing the injury, is no defence to the action; and, if the action be for destroying property entrusted to the defendant, it is no defence that the plaintiff, at the time of delivering the property to the defendant, knew that he was insane. *Morse v. Crawford*, 499.

2. Where it appeared that a mort-

gagor, at the time he executed the note and mortgage, comprehended well what he was doing and the consequences of his acts, the court of chancery held the mortgage valid, although it appeared quite probable that there had been times, previous to the execution of the mortgage, when he might not have had sufficient capacity, — the disease under which he suffered, and of which he ultimately died, being one of the brain, and one which would not, from its nature, be at all times uniform in its influence upon the understanding. *Day v. Seely et al.* 542.

## JUDGMENT.

A judgment rendered against a defendant, omitting his christian name, cannot be considered as void; but an action may be maintained against him on such judgment, averring his identity. *Newcomb et al. v. Peck et al.* 302.

## LANDLORD AND TENANT.

Where to a clause for re-entry, in a lease, for non-payment of rent, there is attached a condition that the landlord shall, before entering, give to the tenant in arrear thirty days notice, the landlord has no right to re-enter, unless he give such notice. The right to re-enter for non-payment of rent is not incident to the estate of the lessor at common law, but must be reserved by deed, and all the conditions, or stipulations, annexed thereto must be strictly followed. *Smith v. Blaisdell et al.* 199.

2. In an action for use and occupation, the defendant cannot dispute the title of his landlord, nor that of the assignee of his landlord; and he is bound to pay rent while he occupies, to the plaintiff, though the assignment from the landlord, under which the plaintiff claims, were fraudulent and void as to the creditors of the landlord. *Steen et al. v. Wardsworth*, 297.

## PARENT AND CHILD.

One who trades with an infant, and gives credit to him alone, knowing all the facts in the case, can never, after that, sustain an action against the father of the infant for the articles thus delivered. *Gordon v. Potter*, 348.

2. Where the defendant permitted his minor son to go out to work by the month, and the plaintiff delivered to

the son certain cloth and trimmings, for articles of necessary clothing, knowing the circumstances, and it did not appear that the father ever expressly authorized the delivery of the articles to the son, it was held that the plaintiff could not recover for them of the father, notwithstanding it appeared that the father knew that the son had purchased the articles, and that he gave the son money to help make up the cloth, and permitted him to wear out the clothes, when made. *Ib.*

3. Where a daughter continues to reside in the family of her father after the age of majority, the same as before, the law implies no obligation on the part of the father to pay for her services. *Andrus et ux. v. Foster*, 556.

4. And the same rule applies to cases where the person, from whom the compensation for services is claimed, took the plaintiff into his family, when she was a child, to live with him until she should become of age, and she continues, after that time, to reside in his family, he standing *in loco parentis* to her. *Ib.*

#### PARTNERSHIP.

One of two partners has not authority to assign all the partnership property to a trustee, for the benefit of the creditors of the firm, and thus put an end to the entire business of the firm. *REDFIELD, J., and BENNETT, J. Dana, Adm'r. v. Lull*, 390.

#### PAYMENT.

Where D. was indebted to A., for which he executed certain promissory notes, and secured them by mortgage upon land, and afterwards executed to him other notes, which were not secured, and, before payment of any of the notes, D. deceased, insolvent, it was held that, if A., after the execution of the notes, became indebted to D., and no application thereof was made in the lifetime of D., his administrators could not direct the application to be made upon the notes secured by mortgage, but that the law would first make the application upon the notes not secured. *Putnam et al. v. Russel et al., Adm'rs.* 54.

#### PROBATE COURT.

When an ancillary administration is

granted in this state upon the estate of one who was a resident of another state, creditors residing in such other state are not entitled to have their claims allowed by the commissioners appointed here. *Churchill et al. v. Boyden, Adm'r.* 319.

2. If the funds found here are more than sufficient to pay the creditors residing here, the court will not ordinarily make any decree of distribution among heirs, or legatees, but will remit the balance to the principal administration; — but this is a matter resting in their discretion. *REDFIELD, J. Ib.*

3. If the estate is solvent, the resident creditors will be entitled to full payment of their claims here; but if insolvent, then the prevailing practice is to pay the resident creditors *pro rata*, taking into the account all the creditors and the whole estate, so far as can be ascertained. *Per Ib. Ib.*

4. But in the state where the principal administration is, the entire mass of the creditors are entitled to have their claims allowed, and to share ratably in the assets, until fully paid. *Per Ib. Ib.*

#### PROMISSORY NOTES.

A contract between A., the owner of a note, and B., that B. may take the note, and collect it at his own expense, and have one half of what he collects, vests no interest in the note in B., nor does it preclude A. from collecting the note, if he has an opportunity. *Maxwell, Adm'r. v. Briggs*, 179.

2. A contract in the form of a promissory note, payable in specific articles, is treated, in this state, as a promissory note, both as to the form of declaring upon it, and as to the necessity of giving evidence as to the consideration, in the first instance, on the part of the plaintiff. *Denison v. Tyson*, 549.

3. A mere trustee may sustain an action as bearer of a promissory note, made payable to a person specified or bearer, for the benefit of the owner, by his consent. *Boardman v. Roger et al.* 589.

4. And such action may be sustained by one, as bearer, by direction of the legal owner of the note, though the note may never have been delivered to the person to whom it is made payable, and though his name may have been used as payee without his consent. *Ib.*

## TAXES.

A recital, in the deed of a collector of a land tax, that "he has in all things pursued the directions of the statute," is not *prima facie* evidence of such fact; but the person claiming under such deed must show that every substantial requisite of the law was complied with. *Brown et al. v. Wright*, 97.

2. Under the third section of the statute of 1807, relative to the sale of lands for non-payment of taxes, which required the town clerk to record, within a specified time after the sale, "the advertisements at length, and the title, the volume, the number and the date of the papers in which they were inserted," it was held that a record of such advertisements, made by the town clerk from the copy of the same, certified by him, in the sales book of the collector, was not a compliance with the statute, and that the collector's deed of land sold, when the record had been thus made, was of no effect to prove the title;—and it was held that the fact that the record was thus made might be shown by the parol evidence of the town clerk who made the record. *Carpenter v. Sawyer et al.*, 121.

## TENDER.

When a person indebted to another makes a tender of the sum due, which is refused, and an action is afterwards commenced before a justice of the peace, the party making the tender must plead it specially at the trial before the justice, if he intend to rely upon it;—it is not sufficient that he offer to produce the money before the justice, but neglect to do so, in consequence of the other party's saying to him that that was not what he wanted, that he wanted more, and that it was of no consequence. *Griffin v. Tyson*, 35.

## TRUSTEE PROCESS.

A deputy sheriff, who has received an execution for collection, and who has, during its life, collected the money due upon it, may be held as trustee of the execution creditor for the amount so collected, if he have it in his hands at the time of the service of the trustee

process upon him; and his liability is not affected by the fact that the execution creditor has never demanded of him payment of such money. *Hurlburt v. Hicks et al. & Tr.*, 193.

2. An attorney who has a demand in his hands for collection at the time of the service of trustee process upon him as trustee of his client, for whom he holds the demand, may be held as trustee of the client, if he collect the money upon the demand after such service, but previous to the making his disclosure. *Ib.*

3. A deputy sheriff held chargeable as trustee for money collected by him on execution, as in *Hurlburt v. Hicks et al. & Tr.*, ante, page 193. *Bullard v. Hicks et al. & Tr.*, 198.

4. One summoned as trustee, who discloses a sum of money in his hands belonging to the principal debtor, but that he has been adjudged chargeable as trustee for the same sum in a prior suit against the debtor, must be discharged, and his costs must be taxed against the plaintiff in the suit, and not be deducted from the amount found in his hands. *Ib.*

5. Under the statute of this state, relative to trustee process, a minor may be charged as trustee for any indebtedness to the principal debtor for necessities, or for any specific goods and chattels of the principal debtor in his hands. *BENNETT, J. Wilder et al. v. Eldridge & Tr.*, 226.

## WATER COURSE.

Where the course of a stream, running across the land of the defendant to the plaintiff's land, was changed by a sudden and unusual flood, so as to run upon the defendant's land without passing over the plaintiff's land, and the defendant permitted the water to run in the new channel, thus formed, for ten years, it was held that he was bound by his acquiescence, and had no right, after such lapse of time, to obstruct the stream upon his own land, so as to divert it from the new channel into the channel in which it had formerly passed across the plaintiff's land. *Woodbury v. Short*, 389.

## Notices of New Books.

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**ARCHBOLD'S SUMMARY OF THE LAW RELATING TO PLEADING AND EVIDENCE IN CRIMINAL CASES, WITH THE STATUTES, PRECEDENTS, OF INDICTMENTS, &c., AND THE EVIDENCE NECESSARY TO SUPPORT THEM.** By JOHN JERVIS, Esq. Q. C., of the Middle Temple, Barrister at Law, with a patent of precedence. Fifth American, from the Tenth London edition, much enlarged and improved. By W. N. WELSBY, Esq., of the Middle Temple, Barrister at Law, Recorder of Chester. New York: Banks, Gould & Co., and Gould, Banks & Gould, Albany. 1846, pp. 860.

This is a handsome reprint of a valuable English manual of criminal law. Though the fifth American edition, it is yet free from any American editing. Nor are we altogether sorry that we miss that sparse peppering of the bottom of the pages with random collections from the digests, which is sometimes called American editing. Were it not for the fear of being called unpatriotic, we should express ourselves in general, in regard to the absence of such annotating additions, very much as Lamb's waggish friend used to ease his mind in regard to the absence of clergymen at a dinner party, when looking round to find some one to say grace, and finding none, he would drop a comment which sounded very like despatching the ceremony, himself—"Is there no clergyman present"?—he would ask; making sure of the absence of the gentlemen of the cloth—"Thank God!"

At any rate, the book before us is an English one, in its present shape, and to be depended on for what it professes to accomplish. A summary of Criminal Pleading and Evidence, as its

title imports, it is really a comprehensive epitome of both those departments of criminal law. Not so very diminutive, either, in its volume, as those will be satisfied who will take pains to look at it in its royal octavo shape of 860 pages; but withal, such a book as a lawyer, if he can have only one at command, will find adequate to most practical emergencies, a good circuit companion, and answering well to the Nisi Priuses of the civil practitioner. We hardly know a legal treatise so eminently up to the practical wants of the profession, as this. A workman who being obliged suddenly to drop his tools, should return and find his work exactly as he left it, would hardly find every thing better prepared for going on, than the criminal lawyer will here find his materials arranged for immediate use. Does he wish to know the latest statute on the subject of his enquiry? Every thing of the kind, (we presume, for we do not profess to be accurate in English statute law,) is furnished to his hand: not the whole statute; for that would encumber the volume: but so much as marks the new material provisions or phraseology. Again, does he look for the appropriate form of an indictment? If he understands himself, (and every practitioner is supposed to know how to consult books,) he will find in two or three lines all the essential niceties set forth which he is anxious about. Does he ask how to follow up his indictment with proof, or what kind of evidence the nature of the crime demands, the volume answers with all the readiness of an experienced counsellor. Finally, does he cast about to know what deflexions the law, whether *scripta* or *non scripta*, has been made to undergo in its practical administration, he has a plain

chart before him, with its windings<sup>1</sup> and curvings distinctly delineated.

Still the book, as we have said, is English; narrowly and practically English: and to a certain extent, just in proportion to its popularity with English practitioners, is it unserviceable to American. Criminal law, on both sides of the water, so far as it may be said to move at all, is manifestly tending to codification or statutory definition. The alteration of punishments in the first instance suggests a remodelling of statute phraseology. Then a patch in a statute which fills up a breach through which, in Bentham's figure, the foxes have run for centuries, renders obsolete whole classes of cases. And lastly, the adoption of new provisions, to which the new decisions conform, renders the departure of English and American criminal law from each other every day wider and wider. In point of progressive advancement, English statute law for many years back, say since Peel's acts and the issue of Romilly's exertions, has in fact quite taken the lead of American. Her jurisprudence had always been our guide; but now it may be affirmed that her criminal legislation is quite in advance of that of the majority of the states. For one, we have greater faith in the ultimate amelioration and scientific construction of her criminal code than of that of any of the United States, Massachusetts not excepted. We only particularize Massachusetts, because from the well known stability of her po-

litical course, a fairer opportunity is afforded of maturing legislative improvements, without the intervention of party contests, than is presented in most or perhaps any of the other states. Still we do not wish by any means to be understood to claim for her present position in regard to criminal legislation, an advance beyond that of her sisters. We think, in fact, too poorly of the penal codes of all our states, to make the question of comparative superiority one worth agitating. Nor while we are upon English reforms in criminal law, should be willing to cite the labors of the late criminal commissioners in that country, with any great degree of satisfaction in corroboration of our prophecy of the future advancement of that department of the law, there. We are pained to express our regret that so much time and money should have produced no more valuable result. The labored mass, in our view, is too fitly described in the line of the classic poet.

Monstrum horrendum, informe, ingens, cui lumen ademptum.

But to return to our criticism. Setting aside the too practically English character of the book, it is of important value for American purposes on account of what it contains upon criminal pleading. There is so little to be found upon this subject in the other criminal law treatises, that what is brought together and furnished here, will be highly prized. There is no good book on criminal pleading, we believe it is generally felt. Mr. Starkie's—a good one for its time,—has gone quite behind the age; at least according to the latest edition published in this country. We had heard that the accomplished writer on Evidence in Harvard University, once meditated giving the profession such a treatise; a kind of love reminiscence of his early labors in the working arena of the law. We only hope that other distracting prizes of juridical achievement, seemingly so plentiful and so close at hand, will not prove so engrossing that he cannot spare a little of himself for this desideratum in the law.

In regard to Mr. Archbold's book generally, we ought to add, that the merits belonging to it, seem of right to be a tenancy in common between him and his editors. So far as we can learn,

<sup>1</sup> Alluding to the windings of the law, we are tempted to say that the oft quoted lines of Schiller, usually applied to extenuate its want of straight-forwardness, contain anything but a syllogism, in our estimation.

"Straight forward goes

The lightning's path, and straight the fearful path  
Of the cannon ball. Direct it flies and rapid  
Shattering that it may reach, and shattering what  
it reaches.

But the road of justice

Curves round the cornfield and the hill of vines,  
Honoring the holy bounds of property."

Coleridge's *Wallenstein*, Act 1, Scene 4.

"The road of justice," it should be observed, is an interpolation of some anonymous legal critic. And Mr. Coleridge has got in the epithet *holy*, for *measured* or *allotted* in the original. But taking the whole as it stands, we submit that it is no better than a fallacy of metaphor, and is no more true of justice than of railroads; or than of Munchausen's gun, which was made to shoot round corners.

he has had nothing to do with it since it was a thin volume of half its present size, in the shape of its second edition in 1824. The third (English) was edited by some nameless editor. Mr. Jervis took it up at the fourth: and Mr. Welsby came in at the seventh and has coöperated with Mr. J. down to the present tenth. Besides the indication of its estimation with the English profession afforded by this large number of editions, within so recent an original publication, it may be stated for a fact, *quantum valcat*, the precise importance of which we do not profess to understand, that it is almost the only criminal law text-book, besides the Pleas of the crown, which we remember to have seen cited in the English courts.

**SOME OBSERVATIONS ON THE LAW-FAIRS OF VIRGINIA, WHICH ARE RESPECTFULLY INSCRIBED TO THE COMMITTEE ON COURTS OF JUSTICE, By THE AUTHOR, (R. R. Collier.)** Petersburg, Va. 1847.

In glancing rapidly over this pamphlet (we have not yet been able to read it,) we think it is written with vigor and earnestness, and contains allusions to, and comments upon, men and transactions, which are well calculated to excite attention in Virginia, whether they are just and true or not. Of many sensible remarks which we have noticed, we copy the following:

"It is worthy the consideration of the legislature, whether it be not wise to enlarge the range of selection for the office of judge of its supreme tribunal, and whether it be not more proper that one filling this high office should have a salary sufficient to enable him to live with his family in Richmond, than that he should be put on an allowance so meagre as to require him to be separated from them half the year. It becomes our legislature also to consider whether they are not chargeable, on other grounds, with the delay in the administration of justice. It is a grievous thing that in the election of a judge, members should act as if they were choosing an elector for the office of president of the United States. If a suitor has his cause delayed or erroneously decided, it is small consolation to him that, at the time the judge was elected, he and the judge concurred in opinion on the question who was the most suitable person to be elected president. An appointment to the general court

bench, upon any such ground, of a man of inferior judicial qualifications, operates most deleteriously in respect to the court of appeals. Many a case necessarily comes up, which, had there been a proper judge below, would have been there finally determined."

**NEW BOOKS RECEIVED.**—A Digest of the Conveyancing, Testamentary and Registry Laws of all the States of the Union; embracing References to the Leading Decisions upon these Subjects in most of the States, together with the Forms of Acknowledgment, Probate, Relinquishment, etc., required by the Statutes of and in use in each. Preceded by a brief Treatise on the General Rules relating to the Nature, Execution and Operation of Deeds and Wills; and followed by an Appendix of the most approved General Forms of those Instruments. Being a Practical Manual and Guide for Lawyers, Public Officers, and Men of Business. By James B. Thornton, late of Virginia, now of Memphis, Tennessee, Attorney at Law. Philadelphia: T. & J. W. Johnson, Law Booksellers, Publishers, and Importers, 197 Chestnut street. 1847.

A Treatise on the Measure of Damages, or an Inquiry into the Principles which govern the Amount of Compensation recovered in Suits at Law. By Theodore Sedgwick. New York: John S. Voorhies, No. 20, Nassau street. 1847.

The Occasional Reporter of Cases in the Courts of Law and Equity of South Carolina. Reported by several Gentlemen of the Charleston Bar. Charleston, S. C.: Burges & James. 1846.

Opinion of John M. Read, Esquire, against the Right of the City Councils to Subscribe for Stock in the Pennsylvania Railroad Company, and to Increase the City Debt and Taxes for that purpose. Philadelphia: Printed for the Committee. 1846.

Paragraphs on the Subject of Judicial Reform in Maryland, shewing the Evils of the Present System, and pointing out the only Remedy for their Cure. Baltimore: Printed by John D. Toy, corner of Market and St. Paul's streets. 1846.

What shall be done with the Practice of the Courts? Shall it be wholly Reformed? Questions addressed to Lawyers. By David Dudley Field. New York: John S. Voorhies, No. 20, Nassau street. 1847.

## Intelligence and Miscellany.

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**THE LATE JUDGE DAVIS.** In our brief notice of the death of this venerable man, in our last number, we expressed a hope that we should be able hereafter to present to our readers a sketch in which some justice might be done to his character and virtues. We cannot do better than to reprint from the Boston Daily Advertiser the following beautiful tribute to the deceased, by George S. Hillard, Esq., who was an intimate friend of Judge Davis, and whose appreciating pen has given a more just and eloquent notice of the deceased than we can hope to see from any other.

Judge Davis had long passed that bourne of three score and ten years, which is the appointed duration of human life, and most of those, who are now living, can remember him only as an old man. Had he lived eleven days longer, he would have entered upon his eighty-seventh year. He had long and worthily discharged honorable and responsible trusts, from all of which he had retired, when such retirement was dignified and graceful; when it was suggested not by disqualifying infirmities, but by the fear of them. His work was finished. His active life was brought to a close. His public duties and trusts had passed into other hands. He had only to wait the final summons and "adjust his mantle ere he fell."

Of course the death of such a man awakens no other feeling than the natural regret caused by the removal of one so long honored and loved. It is only a loss for us that we are to see no more that venerable form, nor hear again the mild wisdom of that voice, which addressed every old man as if he

were a brother, and every young man as if he were a son.

Judge Davis was long in the service of the public. He was a member of the Convention of Massachusetts which adopted the Constitution of the United States. He was the youngest member of that body and the last survivor. He was appointed Comptroller of the Treasury and afterwards District Attorney by Washington and District Judge by the elder Adams. This last office he filled more than forty years. To say that he discharged its duties to the entire satisfaction of the bar and the public, would be giving but faint praise to his judicial life. There was no essential quality of a good judge wanting in him. He was just, learned, patient, courteous and firm. His decisions were sound, wise, and scholarlike. His judicial deportment was beautiful. The motto of a noble English family — *magistratus indicat virum* — recurs to the mind, in remembering Judge Davis. His personal qualities were so admirable that they could gain nothing from the place which he occupied, but they rather added to it. The passionless wisdom, the gentleness, the purity, the elevation of the man shone through the judge and made the court where he sat, venerable. The quiet tones in which he gave his judgment were like the voice of justice itself. His judicial deportment would have made more impression upon vulgar minds had he been a man of more alloy; had been ambitious, impatient, vehement, ostentatious and overbearing. But everything was done so noiselessly and gently that there seemed to superficial apprehension a want of strength. As most men see more power in the eclipse than in the

sun-rise, in the storm than in the sunshine, in the earthquake than in the world's soft spinning upon its daily axle, so we carry the same mistake into our moral judgments. We associate power with a loud voice, an overbearing manner, and impetuous will.

But Judge Davis had none of these. His modesty shrunk with peculiar sensitiveness from anything like display. He sought to do his duty, with no thought as to the impression it might make upon others. Only those members of the bar, who practised before him, could know the soundness of his legal judgment, his accurate learning, his conscientious fidelity to every case that came before him, and the unerring instinct that led him always to the right conclusion and by the right path. He gave a memorable instance of his judicial firmness, by his judgment in favor of the constitutionality of the embargo, when the current of opinion around him was so strongly set the other way. Had he been one of the judges in the case of the ship money, he would have given judgment against the king with his usual calmness, and would have been surprised had any one given him to understand that it was an act deserving to be praised and remembered.

But it is by no means for his public life alone, that Judge Davis is to be honored and held in remembrance. It is possible for a man to be selfish, avaricious, ill-tempered and heartless, and yet be a good judge and faithful public servant. But in the case of Judge Davis we had no need to borrow the mantle of his office to throw over his personal defects. His virtues were so bounteous, so large and so unalloyed that they made the man John Davis greater than any possible office. He was higher than the bench and purer than the ermine. No one ever left his presence without carrying away a peculiar impression of gentleness, sweetness, simplicity, goodness and natural dignity. He never said anything bitter, unkind or uncharitable. He had no acerbities of temperament to subdue. There was no gall in his heart. He carried a judicial conscience into his daily life. Never by word or deed did he do injustice to any human being. Never did he seek his own advancement at the expense of the smallest

rightful claim of others. He had read much and seen much, and thought much, and thus his mind was stored with knowledge and sagacity, and was full of a certain ripe and mellow wisdom. But these gifts were never obtruded. He never said anything for effect. The thought never troubled him that another person might not know that he had this knowledge or that faculty. Whatever came from his mind flowed naturally and unconsciously. He had no wish not to appear what he was, and none to appear what he was not. His common words carried with them the truthfulness of affidavits.

He had an uncommon share of calmness and quietness in his manners and temperament; which qualities are not common in our community. Our organization is so active, and there are so many things to be done here, that there is hardly ever the natural proportion between the doer and his work. Those who have anything to do, have generally too much. Consequently we are hurried, anxious, nervous and restless. But there was always an atmosphere of repose about Judge Davis. He was ever happily and healthily occupied, but never hurried or uneasy. His manner fell, with a soothing influence, upon the restless spirits who had occasion to approach him. There was nothing fitful in his activity; nothing apathetic in his repose.

Judge Davis was already an old man when the writer of this notice first knew him; but nothing of him ever grew old but his body. The qualities that make age unlovely never gathered around him. Time neither narrowed, nor sharpened, nor embittered him; it did not contract the circle of his sympathies; it did not chill his affections or render his judgments harsh; it did not make him a severe censor of the pleasures he had outlived. Neither selfishness, nor moroseness, nor intolerance, nor love of money, ever crossed the threshold of his breast. It was beautiful to see an old man with feelings so fresh and tastes so young. It was the "odorous chaplet of sweet buds" set, but not "in mockery," upon winter's brow. To the last moment of his life he retained unimpaired his taste for simple and natural pleasures; for beautiful scenery, for music, for the sports

of children, for conversation, and, especially, for knowledge in all its forms. One of the last times he appeared in public, was to hear one of those admirable lectures with which Prof. Agassiz has lately been delighting our community. Thus, when he had laid aside all his usual employments, the cheerful, happy, wise old man felt no aching void. His days were not without object and interest. His books, his friends, his tastes, the daily air and sunshine of life, filled up the measure of his time with quiet satisfactions.

Judge Davis was, in no respect, behind his time, but he had less sympathy, than many other men, with the restless progress of the age. Not that he was averse to this, or that he had any anxious fears for the future, but he loved rather to dwell with "backward-looking thoughts." Born in the Old Colony, he early became wedded to the associations which are indigenous to that soil. The Pilgrim fathers, their motives, their principles, their lives were to him a theme for constant meditation, and a subject of constant inquiry. By study and reflection he had so saturated his mind with knowledge of those times and those men, that when he spoke of them, it was with such distinctness, accuracy and precision, that it seemed as if he must have known them and lived among them, and not merely read about them. He seemed to have drawn his information from open vision and not the written word. Carver, and Winslow, and Bradford, and Standish were not seen by him in the cold distance of history as abstractions, but as in the warm and living present, like men whom he had met with, face to face. He delighted to wander over the spots which the footprints of the Pilgrims had hallowed, along the shores where they had landed, and by the hill where they were gathered to their last repose. Upon these themes he never spoke without a certain placid enthusiasm, which suffused his eyes and gave a glow of animation to his countenance. He was himself a model of all that was good in the character of the Pilgrims, without their alloy. He had their purity, elevation, ardent piety and devotion to duty, without their sternness, their austerity or their intolerance. These harsh elements had no place in his genial and

kindly nature. The rigor of the old law governed their conduct and speech; but in him was seen the grace, as well as the truth which were brought by a new and milder dispensation. His very reproofs were gentler than some men's praises.

He was a man of warm domestic affections, and in his family his nature found his best satisfactions. Here there was seen the same sweetness, gentleness, kindness and consideration for others, which marked his intercourse with the world. Nor had he escaped those sufferings to which affectionate natures are exposed. He had mourned over those who, in the course of nature, should have mourned over him. An only son, grandsons who were as dear as sons, the wife of his youth, were taken away from him. But these bereavements only served to give a gentler seriousness to his manner and a more affectionate expression to the countenance which he turned to the friends and kindred that were left behind. His religious trust was a part of his very being. To have been made gloomy, or querulous or harsh by affliction, would have implied a doubt of God's moral providence. That was to him a fact, not a speculation. Was he happy in the society of those whom he loved? it was well. Were they taken away from him? it was also well. And the same spirit of submission reigned over his whole life. One of his last conversations with his family, turned upon a playful inquiry as to how he should amuse himself, in the blindness which he felt was impending over him from his rapidly decaying sight — a cheerful and wise conversation, which left none but pleasant thoughts behind, in the memory of those who heard it. But as to complaining that he was about to be blind, — it no more occurred to him than to complain that he was more than eighty years old.

The long, honorable, and useful life of this venerable man was crowned with an appropriate and fitting close. Without pain, or lingering illness, or anything more than natural decay, by a touch as gentle as that which loosens the ripe apple from the bough, he has been called away from the life that is, to the life that is to be. His illness was very brief and attended with little

or no apparent suffering. Had his friends been permitted to choose the time and manner of his dissolution, they would hardly have asked any other. It was a peaceful euthanasia, and not a struggling death. In the hearts of those who survive him there can be no feeling but gratitude, alike for the prolonged enjoyments of life and for its merciful close.

**TRIAL OF A SLAVE FOR MURDER.** A late Charleston (S. C.) newspaper gives the following account of a capital trial in that city. The trial of Richard, slave of Robert Rowand, charged with the murder of Maria, also the slave of Mr. Rowand, took place at the City Hall yesterday, at 11 A. M. We forbear, on the recommendation of the court of magistrates and freeholders, to publish the evidence in this case, as there is a trial pending before the court of general sessions against Mrs. Eliza Rowand, the mistress, on the same charge, and much of the testimony before the magistrates court being inadmissible in a court of higher jurisdiction, we think it incorrect to prejudice the public mind. The unanimous charge of the court to the freeholders upon the evidence, was, that they were to consider and make up their minds from the facts detailed by the witnesses, whether or not the prisoner was guilty of having struck the blows which proved fatal, as if they were not satisfied that they were inflicted by him, but by Mrs. Rowand, he must be acquitted. The court also charged the freeholder strongly and unequivocally upon the law, that wherever a slave in the presence and command of his owner committed an unlawful act, as murder or other crime, that he was the mere instrument of his owner's cruelty, and having no will of his own, could not be amenable to the punishment of the law. In all such cases the owner was to be regarded as the guilty party, and upon him the vindictory part of the law must fall. In this case, if they from the evidence, came to the conclusion that Richard had even inflicted the fatal blow, being under the control and order of Mrs. Rowand, and that the testimony made out the killing to be murderous, the owner was guilty of murder, and the slave must be acquitted. The freeholders, under the charge of the court, merely retired a

sufficient time to write the verdict "Not Guilty," which was concurred in by the presiding magistrates, and Richard was discharged.

**EXAMINATION IN CHIEF.** A good deal of laxity in the use of the term *examination in chief*, has prevailed in conversation, and sometimes in argument, at the bar. We have an impression of having once heard the term misapplied from the bench of an inferior tribunal; but we had hoped not to see the error getting into print. As a recent volume of Reports (not Mr. Metcalf's) contains such an error, we shall be excused for calling back the attention of the profession to a more accurate use of the phrase.

*Examination in chief* is the examination to the issue, in distinction from the examination upon the *voir dire*, or as to the competency of the witness, and includes both the direct and the cross-examinations. Indeed, there may be, and often is, a direct and cross-examination upon the *voir dire*, as well as *in chief*. It has been said that a passage in Mr. Greenleaf's work on Evidence favors the loose use of the term. Vol. I. sec. 445: "When a witness has been examined *in chief*, the other party has a right to cross-examine him." But on reading the context the meaning is clear. He is laying down the rule that the mere fact of a witness having been examined as to his competency does not make him a witness in chief, so as to entitle the opposite party to cross-examine him upon the issue; and then adds the sentence quoted, to the effect that if the party calling him examines him at all *in chief*, he may be cross-examined in chief. That Mr. Greenleaf uses the term in its strict technical sense is evident from sections 421, 424, and 433 of the first volume, as well as from the passage quoted, when taken with its context. D.

### Hotch-Pot.

It seemeth that this word hotch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — Littleton, § 227, 175 a.

We extract the following passage from Mr. Webster's late argument before the supreme court of the United States, in the case of the steamer Lexington, as reported in the Washington National Era: — "It is a great truth, that England has never produced any emi-

nent writer on national or general public law — no elementary writer, who has made this subject his own, who has breathed his own breath into it, and made it live. In English judicature, Sir William Scott has, it is true, done much to enlighten the public mind upon the subject of prize causes, &c., and in our day McIntosh has written a paper of some merit; but where is your English Grotius? Where is your English Barbeyrac? Has England produced one? Not one. The English mind has never been turned to the discussion of general public law. We must go to the continent for the display of genius in this department of human knowledge. What have the courts of Westminster Hall done to illustrate the principles of public law? With the exception of a tract by Mansfield, of considerable merit, more great principles of public law have been discussed and settled by this court, within the last twenty years, than in all the common law courts of England for the last hundred years! Nay, more important subjects of law have been examined and passed upon by this bench, in a series of twenty years, than in all Europe for a century past. And I cannot forbear to add, that one in the midst of you has favored the world with a treatise on public law, fit to stand by the side of Grotius, to be the companion of the Institutes — a work that is now regarded by the judicature of the world, as the great book of the age — *Story's Conflict of Laws*."

A writer in the Boston Daily Bee is quite indignant at the opinions expressed in the interesting leading article of our last number respecting Mr. Day's Connecticut Reports. Hear him: "Now, if the reviewer, (who is not the editor,) had read six volumes of Mr. Day's sixteen, or *digested* one of that six, or run a reluctant eye over statutes that still savor of the 'blue laws,' or tried to reconcile some hundreds of decisions with common law or common sense, or understood the practical operation of her anomalous equity system, or 'confounded nature' by doing all these; we hardly think he would be so happy to shout 'I am a Connecticut citizen.'"

There is a current rumor that Judges Colby, Ward, and Merrick, of the Massachusetts court of common pleas are about to resign their seats on account of inadequate compensation. Towards this court both political parties have been wanting in duty — the democrats by cutting down the salaries in 1843, and the whigs for not raising them again in 1844. The question is now discussed, whether a total reorganization of the court should not be attempted. It seems clear, that unless the policy of the state towards it is to be changed, the common pleas had better be abolished. It is not improbable that more of the judges will resign than we have mentioned above. No one could blame them for doing it at any time.

## Obituary Notices.

DIED, at Peterborough, N. H., on the 31st of December last, at the residence of his father, JAMES SMITH, Esq., a member of the New Orleans bar, aged 31.

To those who knew Mr. Smith, the announcement of his death will not be unexpected. He fell a victim to that slow, insidious disease, consumption, which has deprived our profession of so many of its most promising members. For more than a year previous to his decease, he had been withdrawn from the active duties of his profession, and in the early part of the past summer he returned to the home of his childhood, with hardly the hope of ever again leaving it. As there are many, among the readers of the Reporter, who were friends of the deceased, it may be a matter of interest to them to know, briefly, the few events of his life.

Mr. Smith was a native of Peterborough, and a kinsman of the late Judge Smith, of Exeter. The early years of his life were spent in his own town, and upon his father's farm. At nineteen, he entered the academy at Exeter, for the purpose of fitting for col-

lege. From the outset, his education was obtained almost entirely by his own exertions. For one of his circumstances and with his aspirations, a better school than Exeter, could not have been chosen — not only for the thoroughness of the instruction given there — in which respect it has always stood highest among the country schools in New England — but because there was everything in the spirit of the place, and the character of the people, to stimulate and encourage a young man striving to educate himself. A singular fatality seems to have attended those who were with him at Exeter. Two out of four of the instructors, then connected with the school — and those the younger two — besides a large number of the scholars, including many with whom he was most intimate, have preceded him to the grave; five, besides himself, victims of the same disease. In the autumn of 1837, Mr. Smith was entered of the sophomore class, in Yale college. During his college life, he sustained a high reputation as a man of industry and ability; he was less distinguished, however, as an exact scholar, than as an active leading

member of the class, and of the literary societies, in which he took much interest. With a view to a future professional course, his studies were not confined to class-books, but took a wider range, into the regions of literature, history and metaphysics.

On leaving college, he went to New Orleans, and thence to Madison Parish, Louisiana, where he remained more than a year, as instructor in the family of Judge Perkins, a wealthy planter, whose sons had been his classmates and intimate friends in college. While here, he began the studies of his profession, privately, and went through the earlier elementary treatises. In the winter of 1841-2, he made an excursion on horseback, in company with a former classmate, through western Louisiana and Texas, as far as the river Nueces. Early in the spring of 1842, he returned to New England, and in April, entered the law school, at Cambridge. While in the school, he was a diligent student, applying himself not merely to the common law, as studied in the classes, but also to the leading treatises on civil law, as forming the basis of the Louisiana code, and as essential to practice in that state. His abilities and aptitude for the profession, won him the respect of all who knew him, and his social qualities, alike conciliated their esteem. In October, 1843, he returned to New Orleans, having chosen that city as a field of future practice, as giving promise of earlier success to a young lawyer than most northern cities. To satisfy the requisitions of the Louisiana law, he spent still another year in professional study, under the tuition of Judge Watts, of the admiralty court, in which court he at the same time received a clerkship. In the autumn of 1844, he was admitted to the bar, and commenced practice. His health at this time began to give way, but he continued to keep his office, until the following summer, when more alarming symptoms began to appear, and by advice of his physicians, he retired, for the warm months, to the more healthful region of the Pine Woods. But his disease had already made such progress, that, on his return to the city in the autumn, his strength was too much prostrated to permit him to resume his professional duties; and at the urgent invitation of his friend, Judge Perkins, he retired to his hospitable mansion, for the winter. Here, every kindness which the solicitude of friends could render, or the wants of an invalid suggest, was shewn him. The winter, however, passed away without amendment; yet without that fatal decline, which his physicians had warned him to expect. In the spring, finding his strength sufficient for the journey, he returned to New England, reaching home in June. Consultations with several eminent physicians on his way, had given him no hope of recovery, and he returned, to wait calmly and patiently for the event. Greater serenity or cheerfulness, under such circumstances, the writer of this notice never witnessed. He seemed to lose none of his interest in passing events, or in books, and happily, until within a few days of his death, his strength was sufficient to allow its indulgence. He sank, at last, rapidly; there was no flickering in

the socket; the taper burned clearly, so long as its aliment lasted, and then went quietly out.

If to be cut off in the morning of life, just when expectations are yielding to fulfilment, when the hardest struggle of life, that of a successful entrance into its busy scenes, has been surmounted, and the well-earned esteem of friends, and talents faithfully cultivated, give earnest of future success, be just cause of regret, then the case before us is eminently a sad one. Few young men have looked to the future with more anxious or juster expectation. To every one it is a field rich with golden harvests, but especially to him, who has toiled through the earlier years of life, insensible to privation, or the effort of self-denial, in the confidence of a full reward to come. To such an one, the struggle with disease must be a hard one—but the successful issue of such a struggle—the final victory won, is the best evidence that the summons comes not too soon; that the lesson of life has been learned; the learner's mission here accomplished. Those who knew Mr. Smith will regret, in him, the loss of one eminently fitted for the practice of his profession; and whose ready humor and great conversational powers made his society always attractive. Those who enjoyed his more intimate friendship, will remember, yet more fondly, the warmth and strength of his affections, and the deep under current of feeling, which a calm exterior did not disclose to the world at large.

At his residence, Fort Cumberland, N. B., January 21, SAMUEL GAY, Esq., aged 93. He was a native of Boston, and brother to the Hon. Ebenezer Gay, late of Hingham, Mass., and a graduate of Harvard University in the class of 1775. The *St. John Observer* says: "He left his native country and became a resident of this province at the commencement of the revolutionary war, and was amongst the first settlers. For a number of years he held the office of chief justice of the common pleas, and justice of the peace for the county: and for several years was returned a representative for Westmoreland. He served in the latter capacity in the first house of assembly organized for New Brunswick, which sat in the city of St. John. He died at an advanced age, highly respected by his neighbors and acquaintance, and esteemed among his friends."

At Monterey, Mexico, December 2, Hon. THOMAS L. HARMAR, a brigadier-general in the volunteer service of the United States. General Harmar, says the *Western Law Journal*, was a citizen of Brown county, Ohio. He was an excellent citizen, an accomplished gentleman, a distinguished lawyer, and justly esteemed for the eminent manner in which he had discharged the duties of many important public stations. Emphatic resolutions were unanimously adopted on the occasion of his death by both branches of the Ohio legislature. Appropriate resolutions were also adopted by the bar at Columbus.

At the residence of Dr. Whitehead, near Tallahassee, Florida, of consumption, January

24, JOHN GEORGE, Esq., attorney at law, of Augusta, Ga., formerly of New Hampshire. Mr. George had come to Florida with the hope of recruiting his health; but it was too late. He died in less than a week after his arrival.

In Brooklyn, N. Y., THEODORE EAMES, Esq., police judge of that city, a native of Haverhill, Mass. For several years he prac-

tised law in Salem, and was afterwards, for a number of years, instructor in the grammar school at that place.

In Cincinnati, December 31, JOSEPH B. WALKER, Esq., aged 37. He formerly resided in Cincinnati, and was in partnership with his brother, Judge Walker. He subsequently removed to St. Louis, and there pursued his profession.

### Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Adams, Elias B.	Roxbury,	Trader,	Jan'y 8,	J. A. Simmons.
Allen, Matthew, Jr.	Harwich,	Mariner,	" 4,	N. Marston.
Allen, Samuel,	Fall River,	Trader,	" 7,	J. J. Holmes.
Anable, John W.	Salem,	Wheelwright,	" 23,	John G. King.
Arnold, Benjamin,	Fitchburg,	Carpenter,	" 21,	Charles Mason.
Ashley, Thomas,	New Bedford,	Board'g House Keep	" 27,	John H. W. Page.
Babcock, Spooner,	New Bedford,	Painter,	" 4,	Oliver Prescott.
Barker, Thomas T.	Boston,	Clerk,	" 15,	William Minot.
Barnard, Cromwell,	Nantucket,	Merchant Tailor,	" 28,	Charles Funker.
Battles, Joseph,	Fitchburg,	Farmer,	" 22,	Isaac Davis.
Bemis, George,	Boston,	Shoe Dealer,	" 21,	Bradford Sumner.
Bennett, William B.	Great Barrington,	Merchant.	Dec. 29,	R. F. Barnard.
Binney, Charles J. F.	Roxbury,	Merchant,	Jan'y 22,	Bradford Sumner.
Boardman, Charles,	Boston,	Boot & Shoe Dealer,	" 18,	George S. Hillard.
Bowen, Orville,	Worcester,	Railroad Contractor,	" 10,	Chas. W. Hartshorn.
Bradstreet, William,	Lowell,	Commis'n Merchant.	" 21,	George W. Warren.
Bragg, Austin,	Boston,	Trader,	" 29,	Bradford Sumner.
Brooks, George,	Weymouth,	Bootmaker,	" 5,	Sherman Leland.
Buckland, Nelson,	Boston,	Machinist,	" 14,	Ellis Gray Loring.
Burt, Silas S.	Taunton,	Trader,	" 23,	John H. W. Page.
Burt, Simeon,	Freetown,	School Master,	" 2,	Horatio Pratt.
Carr, Alexander G.	Charlestown,	Laborer,	" 23,	George W. Warren.
Cole, Henry P.	Boston,	Trader,	" 11,	Ellis Gray Loring.
Cook, Janus,	Roxbury,	Housewright,	" 6,	Sherman Leland.
Coolidge, Charles,	Boston,	Trader,	" 4,	Ellis Gray Loring.
Conant, Cardinal C.	Roxbury,	Merchant,	" 9,	David A. Simmons.
Congdon, Lynes,	Hadley,	Yeoman,	" 8,	Thamar Conkey.
Cunningham, Eph. M.	Boston,	Gentleman,	" 14,	Bradford Sumner.
Cunningham, Samuel H.	Spencer,	Boot Manufacturer,	" 6,	Isaac Davis.
Curtiss, Joseph,	Southbridge,	Laborer,	" 16,	Isaac Davis.
Darling, Collins C.	Medway,	Trader,	" 4,	D. A. Simmons.
Doane, Joseph C.	Weymouth,	Housewright,	" 14,	Sherman Leland.
Dockham, Stevens,	Boston,	Housewright,	" 21,	Bradford Sumner.
Duffey, Patrick,	Quincy,	Stone Cutter,	" 13,	Nath'l F. Safford.
Duffy, Hugh,	Boston,	Tailor,	" 7,	Ellis Gray Loring.
Duffy, John,	Boston,	Tailor,	" 4,	Ellis Gray Loring.
Eastman, George N.	Boston,	Counsellor at Law,	" 7,	George S. Hillard.
Eaton, John L. et al.	Boston,	Tailors,	" 15,	George S. Hillard.
Evans, Rufus M.	Boston,	Carpenter,	" 14,	Bradford Sumner.
Farnum, George B.	Cambridge,	Trader,	" 8,	George W. Warren.
Farnum, G. B. et al.	Boston,	Sash & Door Makers,	" 25,	Bradford Sumner.
Farrell, George,	Boston,	Wood & Coal Dealer,	" 5,	Bradford Sumner.
Fieder, Louis C.	Springfield,	Cabinet Maker,	" 28,	E. D. Beach.
Field, Eugene,	Charlestown,	Mechanic,	Dec. 29,	Rich'd E. Newcomb.
Fogg, Jeremiah,	Boston,	Stove Dealer,	Jan'y 30,	Bradford Sumner.
Forbes, Nicholas,	New Bedford,	Trader,	" 21,	Oliver Prescott.
Gardner, Henry L.	Boston,	Tailor,	" 16,	Bradford Sumner.
Gerrish, Penj. F. et al.	Lowell,	Traders,	" 18,	Bradford Russell.
Glover, Samuel J.	Boston,	Painter,	" 25,	Bradford Sumner.
Goldthwait, Denn'n W.	Lynn,	Liv'y Stable Keeper,	" 9,	John G. King.
Gould, Ivory,	Boston,	Merchant,	" 13,	George S. Hillard.
Grover, Stephen,	Springfield,	Cabinet Maker,	" 28,	E. D. Beach.
Hall, Joseph F.	Boston,	Watchman,	" 9,	Bradford Sumner.
Haskell, Joseph,	Boston,	Gentleman,	" 15,	Bradford Sumner.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Hastings, William et al.	Boston,	Traders,	Jan'y 4,	George S. Hillard.
Hatstat, George W.	Boston,	Gentleman,	" 2,	Bradford Sumner.
Haven, Hiram,	Westboro',	Trader,	" 9,	Henry Chapin.
Hawley, Austin,	Amherst,	Yeoman,	" 15,	Ithamar Conkey.
Hitchcock, George D.	Worcester,	Machinist,	" 4,	Benj. F. Thomas.
Holland, Seneca,	Amherst,	Merchant,	" 6,	Ithamar Conkey.
Holmes, Thomas,	Roxbury,	Rope Maker,	" 4,	David A. Simmons.
Hooker, H. G. O.	Dover,	Shoemaker,	" 23,	Sherman Leland.
Houghton, Merrick,	Amherst,	Butcher,	Dec. 23,	E. Dickinson.
Howard, Barnabas,	Quincy,	Mariner,	Jan'y 2,	Nath'l F. Safford.
Howland, John,	Worcester,	Laborer,	" 8,	Isaac Davis.
Hull, Stephen,	Amesbury,	Merchant Tailor,	" 21,	Ebenezer Moseley.
Hunt, Charles A.	Millbury,	Carpenter,	" 11,	Henry Chapin.
Jardon, Elijah, Jr.	Cummington,	Yeoman,	" 6,	Ithamar Conkey.
Jewell, Hosea,	Boston,	Carriage Driver,	" 6,	Bradford Sumner.
Jinney, Elkanah,	New Bedford,	Housewright,	" 20,	Oliver Prescott.
Johnson, Albert,	Lynn,	Painter,	" 9,	John G. King.
Kell, Alexander R.	New Bedford,	Laborer,	" 14,	Oliver Prescott.
Kelley, Elisha,	Boston,	Clothes Dealer,	" 11,	Bradford Sumner.
Kimball, Nathaniel,	Roxbury,	Baker,	" 25,	Sherman Leland.
Littlefield, James,	Chelsea,	Prickmaker,	" 6,	George S. Hillard.
Lock, Stephen P.	Worcester,	Quarryman,	" 20,	Isaac Davis.
Low, Nicholas,	Charlestown,	Carpenter,	" 9,	George W. Warren.
Mack, Isaac N. et al.	Lowell,	Traders,	" 18,	Bradford Russell.
Magoun, William,	Boston,	Carriage Trimmer,	" 20,	Bradford Sumner.
Maher, Terrence,	Boston,	Baker,	" 14,	Ellis Gray Loring.
Makepeace, Hiram,	Lancaster,	Carpenter,	" 21,	B. F. Thomas.
McElroy, Charles,	Boston,	Merchant Tailor,	" 23,	Bradford Sumner.
McGuinity, Robert,	New Bedford,	Laborer,	" 22,	Oliver Prescott.
McLartz, William,	Boston,	Tailor,	" 2,	Bradford Sumner.
Merrill, James,	Dorchester,	Laborer,	" 19,	Nath'l F. Safford.
Merick, Leander, r	Amherst,	Tailor,	" 2,	E. Dickinson.
Meserve, John A.	Boston,	Mason,	" 21,	Bradford Sumner.
Moody, Cyrus,	Ludlow,	Farmer,	" 14,	Oliver B. Morris.
Munday, Owen,	Boston,	Teamster,	" 7,	Bradford Sumner.
Noble, Edmund, Jr.	W. Springfield,	Laborer,	" 18,	E. D. Beach.
Norris, Henry A.	Boston,	Broker,	" 14,	Bradford Sumner.
Norris, Thomas F.	Cambridge,	Publisher,	" 22,	George W. Warren.
Oliphant, J. W. et al.	Boston,	Druggists,	" 15,	Bradford Sumner.
Parmenter, David F.	Worcester,	Butcher,	" 16,	Henry Chapin.
Phillips, Gilson,	Harwich,	Mariner,	" 23,	N. Marston.
Pierce, William,	Hardwick,	Farmer,	" 12,	Walter A. Bryant.
Plumley, John et al.	Boston,	Tailors,	" 15,	George S. Hillard.
Poole, Lott H.	Boston,	Tailor,	" 21,	George S. Hillard.
Pope, Samuel,	Boston,	Trader,	" 15,	George S. Hillard.
Potter, Ephraim,	Hadley,	Laborer,	" 25,	Ithamar Conkey.
Rhodes, John W.	Boston,	Tailor,	" 21,	Ellis Gray Loring.
Ricker, Jethro H.	Boston,	Carpenter,	" 29,	Bradford Sumner.
Rider, Theodore S.	Oakham,	Shoemaker,	" 13,	Walter A. Bryant.
Ruggles, Simeon,	Boston,	Provision Dealer,	" 8,	Bradford Sumner.
Salvo, Benedict,	Boston,	Merchant Tailor,	" 26,	Bradford Sumner.
Seaver, Benjamin C.	Boston,	Shipwright,	" 2,	Bradford Sumner.
Shumway, Jeremiah,	Stockbridge,	Laborer,	" 11,	Isaac Davis.
Simonds, John P.,	Boston,	Trader,	" 22,	George S. Hillard.
Small, John, 2d,	Dennis,	Mariner,	" 23,	N. Marston.
Spear, George, 2d,	Quincy,	Master Mariner,	" 12,	Sherman Leland.
Spooner, Seth C.	New Bedford,	Trader,	" 26,	Oliver Prescott.
Stebens, Thomas,	Lowell,	Victualer,	" 20,	Bradford Russell.
Stevens, Robert P.	Marblehead,	Trader,	" 20,	John G. King.
Stiles, Anson G.	Millbury,	Trader,	" 15,	Henry Chapin.
Taylor, John,	Cambridge,	Laborer,	" 19,	Bradford Russell.
Thisul, Ames,	Beverly,	Shoe Manufacturer,	" 16,	David Roberts.
Titecomb, Robert	Boston,	Stair Builder,	" 27,	Bradford Sumner.
Town, Samuel et al.	Boston,	Traders,	" 7,	George S. Hillard.
Treadwell, Nathaniel,	Boston,	Housewright,	" 9,	Bradford Sumner.
Upton, Eugene A.	Boston,	Gentleman,	" 4,	Bradford Sumner.
Waters, William S.	Boston,	Truckman,	" 14,	Bradford Sumner.
Wetherbee, Isaac,	Charlestown,	Laborer,	" 2,	George W. Warren.
Wharfield, Rowland C.	West Stockbridge,	Farmer,	" 27,	Horatio Byington.
Wheelwright J. W. et al.	Boston,	Druggist,	" 15,	Bradford Sumner.
White, Joseph,	Boston,	Board'g House Keep-	" 7,	Bradford Sumner.
Whitney, Sumner, and } Whiston, Francis G. }	Boston,	Merchants, [et	" 7,	Bradford Sumner.
Wilder, William S.	Fitchburg,	Paper Ruler,	" 4,	Charles Mason.
Wilkinson, Wesley,	Boston,	Machinist,	" 11,	Ellis Gray Loring.
Willard, William,	Cambridge,	Hatter,	" 1,	George W. Warren.
Williams, James,	Boston,	Tailor,	" 23,	Bradford Sumner.
Wilson, Edward,	Gloucester,	Tailor,	" 5,	John G. King.
Woodman, Edwin,	Charlestown,	Hat Manufacturer,	" 11,	Bradford Sumner.
Wyeth, Noah et al.	Boston,	Sash & Door Maker,	" 25,	Bradford Sumner.